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# **A Time for Action**


## **Highlights of the Federal Government's Proposals for the Renewal of the Canadian Federation**

The Right Honourable  
Pierre Elliott Trudeau  
Prime Minister



**Government  
of Canada**

**Gouvernement  
du Canada**

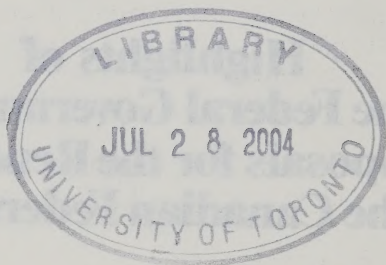


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# **A Time for Action**

## **Highlights of the Federal Government's Proposals for the Renewal of the Canadian Federation**





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# **A Time for Action**

## **Highlights of the Federal Government Proposals for the Renewal of the Canadian Federation**

The federal government has launched a new and intensive effort toward the renewal of the Canadian Federation. This renewal will require:

- a new affirmation of the Canadian identity;
- a new definition of the principles which underlie the Federation;
- a new approach to cooperation among our governments;
- a new Constitution.

## **The Affirmation of the Canadian Identity**

Canada has made us what we are today and it has made us more alike than we may think. We share a history, a vast territory, a North American spirit, a sense of national solidarity, and the same democratic values. Other values should be brought into this consensus: linguistic equality, cultural diversity, the dignity of native peoples, and the self-development of the regions. We must not only accept that other groups in Canada may be different from our own, but also respect them for what they are. Friendship, solidarity and mutual respect among groups that wish to maintain their character are essential elements of the Canadian identity.

Our identity should therefore be based on respect for these differences and on the recognition that the principle of unity in no way implies uniformity.

## **The Principles of Renewal**

The great debate on national unity has clearly indicated that most Canadians understand the need for renewal and are determined to carry it out. "In every generation, Canadians have had to rework the miracle of their political existence", said historian Arthur Lower; *and so it is now, with our generation*. This renewal must be built on fundamental principles reflecting the basic realities of Canada. The government proposes the following guiding principles.

### **Pre-eminence of citizens and of their freedoms**

*The renewal of the Federation must confirm the pre-eminence of citizens over institutions, guarantee their rights and freedoms and ensure that these rights and freedoms are inalienable.*

### **Full respect of native rights**

*The renewal of the Federation must fully respect the legitimate rights of the native peoples, recognize their rightful place in the Canadian mosaic as the first inhabitants of the country, and give them the means of enjoying full equality of opportunity.*

### **The full development of the two linguistic majorities**

*The renewal of the Federation must guarantee the linguistic equality of its two major communities,*



*the English-speaking and the French-speaking, and assure that Canadian institutions exist to help each group to prosper.*

### **The enhancement of the mosaic of cultures**

*The renewal of the Federation must lead to respect for cultural diversity and for the right of every citizen, regardless of ethnic origin, to equal opportunity. Every cultural community should be able to rely on the support of governments in preserving its own cultural heritage and in discovering and appreciating those of other communities.*

### **The self-development of regions**

*The renewal of the Federation must, in all fields, promote the self-development of regions by avoiding excessive centralization.*

### **Fostering economic integration**

*The renewal of the Federation must lead to closer economic integration of the regions of the country and make it possible for all to share its benefits more equally.*

### **Promoting national solidarity**

*The renewal of the Federation must extend and strengthen solidarity among citizens of all regions and communities of the country.*

### **Interdependence of the two orders of government**

*The renewal of the Federation must establish clearly the authority and role of the federal and provincial orders of government, recognizing their interdependence and sharing of internal sovereignty, with each order of government equally subject to the Constitution.*

## **Strengthening Canada as a united country to serve all Canadians**

*The renewal of the Federation must produce a Canada that has the strong support of all Canadians and to which their loyalties can and will be firmly attached. A Canada strong in such support and loyalty will be best able to serve the interests of Canadians.*

## **Renewing the Practice of Federalism**

Federalism is the only form of government consistent with the realities of Canada: it is neither too centralized nor too loose a union. The character of Canadian federalism has varied with time, so that today the federal and provincial governments are more interdependent than at any point in our history.

The federal government proposes the following objectives so that this interdependence may operate effectively while permitting each order of government to serve its citizens as well as possible:

- (1) to bring about a less contentious federal-provincial relationship;*
- (2) to make the process of consultation more expeditious and less demanding of time and other resources;*
- (3) to ensure the greatest degree of freedom of action for each government to fulfil its constitutional responsibilities, including access to necessary*

*financial resources through its own taxation or equalization payments;*

- (4) to permit greater accountability of each government to its legislature, and to its electorate;*
- (5) to enable the intergovernmental process to be better understood by taxpayers, by citizens and by those engaged in it;*
- (6) to eliminate wasteful duplication of legislation, regulation, policies, programs or services, and generally to make the effective provision of services by governments less costly.*

The federal government commits itself to work with the provincial governments to achieve these objectives. In particular, it undertakes the following:

**(1) Federal respect for provincial responsibilities and priorities**

*To take deliberate steps to ensure that, for its part, the federal government takes fully into account the constitutional responsibilities and priorities of provincial governments, by consulting the provinces when preparing a legislative proposal, formulating a policy, or designing a program that is in an area of shared jurisdiction or that could have a significant effect—financial or other—on an area of provincial responsibility or an activity within that area;*

**(2) Provincial respect for federal responsibilities and priorities**

*To request that the provinces, in the same spirit, consult the federal government when preparing*



*legislative proposals, formulating policies, or designing programs that are in areas of shared jurisdiction or could have a significant effect— financial or other— on an area of federal responsibility or an activity within that area;*

**(3) More effective consultations**

*To develop with the provinces ways to make the federal-provincial consultative process more expeditious and more effective;*

**(4) Clarification of responsibilities**

*To clarify with the provinces existing responsibilities, on a sector-by-sector basis and to the extent possible, so that governments, legislators, public servants and, most important of all, the public will have a much clearer knowledge of where responsibilities lie;*

**(5) Elimination of wasteful duplication**

*To study jointly with the provinces, as a matter of high priority, ways in which wasteful duplication of activities between the two orders of government can be eliminated or avoided, including the possibility, in appropriate cases, of providing programs or services through jointly-sponsored agencies.*

# A New Constitution for Canada

The Constitution describes the system of government which Canadians freely chose to watch over their destiny and that of their country. It is the legal and institutional expression of Canadian unity. This means that when we decide to renew our system of government in order to consolidate the unity of our country, we must proceed through the renewal of our Constitution.

*The government has resolved to provide Canada with a new Constitution by the end of 1981.*

*To do this it will use all of the powers at its disposal and, in doing so, will consult the governments of the provinces.*

*It urges the provinces to cooperate with it in order to renew the constitutional provisions which cannot be amended without their cooperation.*

*The government sets only two conditions for the renewal of the Constitution.*

*The first is that Canada continue to be a genuine Federation, that is, a state in which the Constitution establishes a federal Parliament with real powers which apply to all parts of the country, and provincial legislatures with equally real powers within their respective territories.*

*The second is that a Charter of Basic Rights and Freedoms be included in the new Constitution and that it apply equally to both orders of government.*

We need only regard the remarkable progress of Canada in 110 years to realize that our Constitution has generally served us well. Nonetheless, our present Constitution has a number of deficiencies which should be remedied.

## **Deficiencies of our Constitution**

- It is based largely on Acts of the British Parliament and has not yet been properly rooted in Canada.
- Its provisions are scattered through a large number of statutes, many of which are unknown to the general public.
- It has no preamble or statement of principles; its language is obscure, its style plodding and uninspiring.
- It has little educative value and Canadians find in it little which inspires patriotism.
- It makes no mention of basic rights or freedoms, and it is inadequate to protect language rights.
- Its division of legislative powers between the federal and provincial governments is neither as precise nor as functional as might be wished.
- The character of the Senate provides only limited capacity for the expression of regional and provincial concerns.
- The status of the Supreme Court is not set forth in the Constitution but is defined by a simple Act of Parliament. This and the exclusive responsibility of the federal executive for appointing judges to the Supreme Court have sometimes detracted from the Court's standing as the ultimate interpreter of the Constitution.
- The amendment procedure is not adequately defined and for certain matters still requires the intervention of the British Parliament.

## **Major premises of renewal**

The principles given earlier for the renewal of the Federation, apply directly to the renewal of

the Constitution. The government believes the renewed Constitution should include the following elements.

### **(1) A Statement of Aims**

*A Statement of Aims would be designed to reflect what Canada means to us all. The government will put forward a Statement to help in the search for the ideal words that will express what is in our hearts.*

### **(2) A Charter of Rights and Freedoms**

*The government will propose a Charter which would embrace political and legal rights and freedoms, many of which have already been recognized in various federal and provincial statutes, as well as measures for establishing new rights for Canadian citizens, to live and work wherever they wish in Canada, and new protection for minority language rights, such as the right of English or French language minorities to receive basic services from governments and schooling for their children in their language.*

### **(3) A new distribution of powers**

*The government believes legislative powers should be distributed between the federal and provincial governments to ensure an effective functioning of our governments in the service of the people. Canada is already a very decentralized Federation so the solution will not lie in a massive shift of powers from the federal government to the provinces. Rather, the government anticipates a judicious combination of changes, with some give-and-take between governments.*

*It is possible to clarify the division of powers so that citizens understand more clearly which order of government is responsible for what, without in the*

*process tying one or the other order of government into a constitutional strait-jacket.*

*One purpose would be to eliminate overlaps and duplication which have no real justification. In addition, some reciprocal transfers of powers might permit each order of government to legislate or to act more effectively in certain sectors.*

*The government considers that it would be useful to examine with the provinces the possible extension of areas of joint or concurrent jurisdiction and the recognition of a paramount power for one or the other order of government in certain sectors.*

*In each case, it will be necessary to give greater importance to the relationships between the responsibilities of the two orders of government than was required in the circumstances of the Fathers of Confederation in 1867. In other words, it is not just the **framework** of the division of powers that needs to be examined and updated, but also the **joints** and **hinges** which ensure the effective interlocking of federal and provincial powers.*

#### **(4) Provisions regarding the Executive of our central government**

*At present, a number of important principles and institutions are touched on only very indirectly, or not at all, in our written Constitution. It seems appropriate for the Constitution to say something about such institutions and principles, and the government will make proposals to this effect.*

#### **(5) A House of the Federation**

*This new House would replace the Senate. It would provide a role for the provinces in the selection of*



*its members, and for a proportionately greater representation to the eastern and especially to the western parts of the country.*

## **(6) The Supreme Court**

*The Supreme Court, a pillar of our system, should be provided for in the Constitution. It seems appropriate that the provincial governments should have a voice when appointments to the Court are made by the Government of Canada.*

## **(7) An amending procedure and the patriation of the Constitution**

*Agreement should be reached to enable us to amend all aspects of our Constitution.*

# **The Timetable and the Process**

*The process of constitutional renewal should encourage full discussion among the people of Canada, in Parliament and the legislatures, and among governments so that all can make their contribution.*

## **Timetable for renewal**

*Given the need for renewal, the process should be designed to achieve within a reasonable period of time the changes that are desired.*

## **Phase I**

*Phase I of the process should cover those matters upon which Parliament can legislate on its own authority. These include the Supreme Court, the House of the Federation, the federal executive, the Statement of Aims and the Charter of Rights and Freedoms. This phase should be completed and legislation passed by July 1, 1979.*

## **Phase II**

*Phase II of the process should cover those matters whose amendment requires the cooperation of federal and provincial authorities. The federal government would like to see this phase completed so that we might proclaim the new Constitution of Canada before July 1, 1981.*

*In 1981, we shall mark the 50th anniversary of Canada's accession, by the Statute of Westminster, to formal independence and international sovereignty. It would be desirable to celebrate that anniversary by proclaiming our new Constitution.*

The government will soon be informing Parliament and all Canadians of the details of its proposals under Phase I of constitutional renewal. There is no expectation that these proposals would be passed in this session or without change. They should form a basis for a wide discussion. From this, a final version should result which can provide the first step toward constitutional renewal.

# **A Time for Action**

We have not yet found that ideal balance that will make it possible for Canadians to enjoy full pride and satisfaction in belonging and contributing to this great country, while preserving the value of belonging to and fulfilling themselves as members of its various communities. But we are engaged in the search for that balance and we can be confident the search will succeed.

These discussions and search will lead to a new national spirit among Canadians to work for the creation of a richer life together. The same spirit will inspire our governments to find new ways of co-operating in the public interest. And it will lead to, and be symbolized in, a new Constitution.

That is why the government will pursue with the utmost resolution the process of renewal.

That is why it urges all the provincial governments to cooperate in this renewal.

That is why it urges all Canadians to join their governments in consolidating national unity and thereby ensuring the stability and prosperity of Canada.



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engager les consultations les plus larges. Ces consultations permettront de formuler des propositions définitives afin d'accomplir la première étape du renouvellement.

## Le temps d'agir

Nous ne sommes pas encore parvenus à instaurer l'équilibre idéal qui permettrait à tous les Canadiens d'être aussi fiers qu'ils le pourraient d'appartenir à ce grand pays, de contribuer à part entière à son devenir et d'éprouver la satisfaction profonde de pouvoir s'épanouir pleinement comme membres de ses diverses collectivités. Mais nous devons nous efforcer d'y parvenir avec ardeur et avec la confiance de réussir.

Notre réflexion collective suscitera un nouvel esprit national chez les Canadiens. Le même esprit doit animer tous les gouvernements du pays et les inciter à la coopération étroite que le bien commun exige. La nouvelle Constitution du Canada sera l'incarnation et le symbole du nouvel esprit canadien.

Voilà pourquoi le Gouvernement poursuivra d'ici là, sans défaillance, voire avec acharnement, le processus de renouvellement.

Voilà pourquoi il conjure tous les gouvernements provinciaux de participer à ce renouvellement.

Voilà pourquoi il presse tous les Canadiens d'appuyer les efforts de leurs gouvernements pour consolider l'unité du pays et assurer ainsi la stabilité et la prospérité de la fédération canadienne.





**Echéancier du renouvellement**

Mais puisqu'un renouveau s'impose, le processus doit conduire à des modifications constitutionnelles dans des délais raisonnables.

### **La phase I**

La première phase du renouvellement portera

sur les dispositions constitutionnelles que le Parlement fédéral peut modifier de sa propre autorité. Ces dispositions touchent la Cour Suprême, la Chambre de la Fédération, l'exécutif fédéral, la déclaration des objectifs et la charte des droits. Cette phase devra être complétée et les mesures législatives qu'elle nécessitera promulguées avant le 1<sup>er</sup> juillet 1979.

### **La phase II**

La deuxième phase portera sur les dispositions constitutionnelles dont la modification requiert la coopération des autorités fédérales et provinciales. Le Gouvernement fédéral a pour objectif de compléter cette phase pour que nous puissions proclamer la nouvelle Constitution du Canada avant le 1<sup>er</sup> juillet 1981.

Nous célébrerons, cette année-là, le cinquantième anniversaire de l'accession du Canada à l'indépendance formelle et à la souveraineté internationale par le Statut de Westminster. Il serait hautement souhaitable que nous puissions marquer cet anniversaire en proclamant notre nouvelle constitution.

Le Gouvernement soumettra bientôt au Parlement et au peuple des propositions détaillées en ce qui touche la première phase du renouvellement constitutionnel. On ne doit pas s'attendre à ce que ces propositions soient adoptées pendant la session en cours, ou sans modifications; leur publication visera plutôt à

importants ou de certaines institutions du pouvoir fédéral. Le Gouvernement entend donc faire des propositions pour combler cette lacune.

## **5) La Chambre de la Fédération**

Le Gouvernement propose que le Sénat soit remplacé par une Chambre de la Fédération. Les provinces joueraient un rôle dans le choix des membres de la nouvelle Chambre. De plus, la composition de cette Chambre assurerait une meilleure représentation aux régions de l'est et, surtout, de l'ouest du pays.

## **6) Le statut de la Cour Suprême**

Un des piliers de notre système de gouvernement, la Cour Suprême, devrait être établie par la Constitution. Il serait approprié que les gouvernements provinciaux aient voix au chapitre lorsque le Gouvernement du Canada procède à la nomination des membres de ce tribunal.

## **7) La procédure d'amendement et le domicile de la constitution**

Nous devons en arriver à une entente afin de pouvoir modifier nous-mêmes tous les aspects de notre constitution.

# **L'échéancier et le processus**

Le processus du renouvellement de la Constitution doit favoriser la libre discussion des questions à l'étude au sein de la population, du Parlement fédéral et des législatures provinciales, pour que tous puissent contribuer à son accomplissement.

fédéral aux provinces ne résoudrait pas nos problèmes. Le Gouvernement prévoit plutôt une combinaison judicieuse de changements, dans les deux sens.

Il est possible de clarifier le partage des pouvoirs pour que les citoyens sachent mieux qu'il doit faire quoi, sans pour autant emprisonner l'un ou l'autre ordre de gouvernement dans quelque carcan constitutionnel. Il faudra donc chercher à supprimer les chevauchements et les doubles emplois qui n'ont pas leur raison d'être.

Certains échanges ou transferts réciproques de pouvoirs pourront aussi être envisagés afin de permettre à chaque ordre de gouvernement de légiférer ou d'agir d'une manière plus cohérente dans certains secteurs.

Le Gouvernement est disposé en outre à examiner avec les provinces l'extension des domaines de compétence concurrente, et la reconnaissance à l'un ou à l'autre ordre de gouvernement d'un pouvoir prépondérant dans des secteurs précis.

Dans tous les cas, il faudra accorder beaucoup plus d'importance que les Pères de la Confédération n'ont dû le faire en 1867 à l'agencement des compétences respectives des deux ordres de gouvernement. En d'autres mots, ce n'est pas seulement la **charpente** du partage des pouvoirs qu'il faudra examiner et adapter aux besoins de l'heure, mais aussi les **tétons** et les **mortaises** qui assurent l'imbrication des pouvoirs fédéraux et des pouvoirs provinciaux.

#### 4) Les institutions de l'exécutif du

#### Gouvernement fédéral

Notre constitution actuelle ne traite qu'indirectement ou pas du tout, de principes

transfert massif des pouvoirs du Gouvernement  
 risant déjà par sa très grande décentralisation, un  
 population. La fédération canadienne se caracté-  
 les deux ordres de gouvernement au service de la  
 constitution devra mettre le plus efficacement possible

**pouvoirs législatifs** prescrite par la nouvelle  
 Le Gouvernement estime que la répartition des

### 3) Une nouvelle répartition des pouvoirs

cette langue, là où le nombre le justifie.  
 officielle et de pouvoir faire instruire leurs enfants dans  
 des services essentiels dispensés dans leur langue  
 langue française ou de langue anglaise d'avoir accès à  
 ces garanties portera sur le droit des minorités de  
 garanties pour les minorités de langue officielle. Une de  
 leur semble au pays, et en instaurant de nouvelles  
 citoyens canadiens de résider et de travailler là où bon  
 en établissant de nouveaux droits pour tous les  
 diverses lois fédérales et provinciales, mais il innovera  
 ques des citoyens, lesquels sont déjà reconnus dans  
 inclura-t-il les principaux droits politiques et juridi-  
 des droits et libertés. Non seulement ce document  
 Le Gouvernement présentera un projet de Charte

### 2) Une charte des droits et des libertés

Canadiens.  
 mieux l'esprit et les objectifs qui animent les  
 gouvernements du pays, d'un texte exprimant au  
 d'orienter la recherche, par les citoyens et les  
 nement entend publier un projet de déclaration afin  
 ce que le Canada signifie pour nous tous. Le Gouver-  
 Cette déclaration des objectifs visera à exprimer

### 1) Une déclaration des objectifs

énoncés précédemment. Le Gouvernement a donc  
 propose que la nouvelle Constitution du Canada  
 contienne les dispositions suivantes.

*Le renouvellement constitutionnel devra corriger ces défauts en s'inspirant des grands principes*

## **Les orientations du renouvellement**

- un grand nombre de statuts distincts, dont plusieurs sont à peu près inconnus de la population canadienne.
- Elle ne contient ni préambule, ni énoncé de principes; sa langue est obscure, son style lourd et peu inspirant.
- Elle a donc une piètre valeur éducative, et les Canadiens y trouvent peu de choses qui puissent leur inspirer la fierté.
- Elle ne traite pas des droits et libertés fondamentales, et elle protège d'une manière inadéquate les droits linguistiques.
- Elle répartit les pouvoirs entre le Parlement fédéral et les législatures provinciales d'une manière qui n'est ni aussi précise, fonctionnelle ou explicite qu'on le souhaiterait.
- Elle ne permet pas l'expression d'un éventail suffisamment large de préoccupations d'ordre régional et provincial au Sénat.
- Le statut de la Cour Suprême n'est pas inscrit dans la Constitution et n'est défini que par une loi ordinaire du Parlement fédéral. Ce statut juridique et la procédure de désignation de ses juges sont épisodiquement remis en cause, ce qui porte atteinte au prestige de ce tribunal comme interprète en dernière instance de la Constitution.
- La procédure d'amendement de la Constitution n'est pas adéquatement définie et exige toujours, pour certains titres, l'intervention du Parlement britannique.



• Ses différentes dispositions sont éparpillées dans

• Elle découle en grande partie des Lois du Parlement britannique et elle ne s'est pas encore domiciliée au pays.

### **Les défauts de notre constitution**

Il suffit d'évoquer la croissance remarquable du Canada depuis cent dix ans pour établir que notre constitution nous a généralement bien servis. Néanmoins, elle comporte plusieurs défauts qu'il nous faut corriger.

Le Gouvernement vise à doter le Canada d'une nouvelle constitution avant la fin de 1981. Il usera, pour ce faire, de tous les pouvoirs dont il dispose et, ce faisant, il consultera les gouvernements des provinces.

Il presse les provinces de coopérer avec lui pour renouveler les dispositions constitutionnelles qui ne peuvent être modifiées sans leur coopération. Il ne pose que deux préalables au renouvellement de la Constitution.

Le premier, c'est que le Canada continue d'être une véritable fédération, soit un État dont la constitution établit un Parlement fédéral avec des pouvoirs réels s'appliquant dans l'ensemble du pays, et des parlements provinciaux avec des pouvoirs non moins réels s'appliquant sur le territoire de chaque province.

Le second, c'est qu'une charte des droits et libertés fondamentales soit insérée dans la nouvelle constitution et qu'elle s'applique également aux deux ordres de gouvernement.

par secteur, les responsabilités de chaque autorité gouvernementale, afin que les gouvernements, les législateurs, les fonctionnaires et, ce qui importe le plus, le public, sachent mieux comment ces responsabilités sont partagées.

### **5) Réduction des chevauchements**

Que soient examinés avec les provinces, à titre prioritaire, les moyens de supprimer ou d'éviter le chevauchement inutile des initiatives des deux ordres de gouvernement, y compris la possibilité, le cas échéant, d'administrer des programmes ou de fournir des services par l'entremise d'organismes conjoints.

## **Une nouvelle constitution pour le Canada**

La Constitution décrit le système de gouvernement que les Canadiens choisissent librement pour veiller à leurs destinées et à celles du pays. Elle est donc le fondement juridique de l'unité canadienne. Par conséquent, lorsque nous décidons, pour consolider l'unité du pays, de renouveler notre système de gouvernement, nous devons, par le fait même, renouveler notre constitution.

## **1) Respect pour les responsabilités et les priorités des provinces**

Que les mesures voulues soient prises pour que le Gouvernement fédéral tienne pleinement compte des responsabilités constitutionnelles et des priorités des gouvernements provinciaux, notamment en consultant les provinces au moment de la préparation de propositions législatives, de la formulation de politiques, ou de l'élaboration de programmes qui se rattachent à un domaine où les responsabilités sont partagées, ou qui pourraient avoir des répercussions considérables (financières ou autres) sur un secteur ou un programme de compétence provinciale.

## **2) Respect des provinces pour les responsabilités et les priorités du Gouvernement fédéral**

Que les provinces, dans le même esprit, consultent le Gouvernement fédéral lorsqu'elles préparent des initiatives qui touchent à un domaine où les responsabilités sont partagées, ou qui pourraient avoir des répercussions considérables (financières ou autres) sur un secteur ou un programme de compétence fédérale.

## **3) Consultations plus efficaces**

Que le Gouvernement recherche avec les provinces les moyens de rendre plus expéditif et plus efficace le processus de consultation fédérale-provinciale.

## **4) Partage des responsabilités**

Que soient précisées dans toute la mesure du possible, avec le concours des provinces et secteur

soit une union politique qui fait la juste part entre la centralisation et la décentralisation. Avec le temps, la nature du fédéralisme canadien s'est modifiée, de sorte qu'aujourd'hui, le Gouvernement fédéral et ceux des provinces sont plus interdépendants que jamais auparavant.

Pour que cette interdépendance soit efficace et permette à chaque ordre de gouvernement de servir les citoyens le mieux possible, le Gouvernement fédéral a proposé les objectifs suivants:

- 1) harmoniser les rapports fédéraux-provinciaux;
- 2) accélérer le processus de consultation, et le rendre plus économique à tous égards;
- 3) assurer la plus grande liberté d'action possible à chaque gouvernement pour qu'il puisse s'acquitter de ses responsabilités constitutionnelles, y compris l'accès aux ressources financières requises, par le truchement de ses propres pouvoirs d'imposition ou de paiements de péréquation;

- 4) accroître la responsabilité de chaque gouvernement devant sa législature et son électorat;
- 5) permettre aux contribuables et aux autres citoyens de mieux comprendre le processus intergouvernemental;

- 6) éliminer le chevauchement inutile de lois, règlements, politiques, programmes ou services et, de façon générale, rendre moins coûteuse la prestation des services gouvernementaux.

Le Gouvernement fédéral s'engage à collaborer avec les gouvernements provinciaux à la réalisation de ces objectifs. Il propose en particulier ce qui suit:

Le fédéralisme est le seul régime de gouvernement qui soit compatible avec la réalité canadienne,

## **Le renouvellement de la pratique du fédéralisme**

Le renouvellement de la fédération doit faire du Canada un pays auquel tous ses citoyens pourront donner sans réserve leur allégeance et leur loyauté. Fort de cette allégeance et de cette loyauté, un Canada renouvelé pourra servir au mieux les intérêts de tous les Canadiens.

**Le renforcement de l'unité d'un Canada au service de tous ses citoyens**

Le renouvellement de la fédération doit mieux établir ses deux pouvoirs, le pouvoir fédéral et le pouvoir provincial, qui sont interdépendants, bien qu'également assujettis à la Constitution, et se partagent la souveraineté interne.

### **L'interdépendance des deux ordres de gouvernement**

Le renouvellement de la fédération doit accroître et approfondir la solidarité entre citoyens de toutes les régions et de toutes les collectivités du pays.

### **L'extension de la solidarité nationale**

poussée entre les régions du pays et permettre à toutes d'en profiter plus également.



## **Le plein respect des droits des autochtones**

Le renouvellement de la fédération doit conduire au plein respect des droits légitimes des autochtones, reconnaître la place qui leur revient dans la mosaïque canadienne à titre de premiers occupants du pays, et leur donner les moyens de jouir pleinement de l'égalité des chances.

## **L'épanouissement des deux majorités**

### **linguistiques**

Le renouvellement de la fédération doit garantir l'égalité linguistique de ses deux grandes collectivités, l'anglophone et la francophone, et assurer que les institutions canadiennes existent pour favoriser l'épanouissement de chacune.

## **La mise en valeur de la mosaïque des cultures**

Le renouvellement de la fédération doit mieux reconnaître le principe de la diversité des cultures et le droit de tout citoyen, quelle que soit son origine ethnique, à l'égalité des chances. Toutes les collectivités culturelles doivent pouvoir compter sur l'appui des deux ordres de gouvernement pour préserver leur patrimoine culturel et pour découvrir et apprécier celui des autres.

## **Le développement autonome des régions**

Le renouvellement de la fédération doit favoriser en tous domaines le développement autonome des régions, en évitant la centralisation excessive.

## **La poursuite de l'intégration économique**

Le renouvellement de la fédération doit conduire à une intégration économique plus

## Les principes du renouvellement

canadiennes puissent être différentes des nôtres, mais aussi les respecter pour ce qu'elles sont. L'amitié, la solidarité et le respect entre collectivités qui se veulent différentes sont des valeurs essentielles de l'identité canadienne.

Notre identité doit donc être fondée sur le respect de ces différences et sur la reconnaissance du principe voulant que l'unité ne soit pas synonyme d'uniformité.

L'évolution du grand débat sur l'unité du pays démontre que l'immense majorité des Canadiens a compris que le renouvellement de la fédération s'impose et qu'elle est décidée à l'effectuer. «Chaque génération de Canadiens doit accomplir de nouveau le miracle de son existence politique», a dit l'historien Arthur Lower; notre génération ne fait pas exception. Pour réussir, ce renouvellement doit être fondé sur des principes capables d'englober les réalités fondamentales de notre société. Le Gouvernement propose donc les principes suivants.

### La primauté des citoyens et de leurs libertés

Le renouvellement de la fédération doit consacrer la primauté des citoyens sur les institutions, garantir leurs droits et libertés, et assurer que ces droits et libertés sont inaliénables.

# **Le temps d'agir**

## **Sommaire des propositions du Gouvernement fédéral visant le renouvellement de la fédération canadienne**

Le Gouvernement fédéral a engagé le renouvellement de la fédération canadienne. Ce renouvellement nécessitera:

- une nouvelle affirmation de l'identité canadienne;
- une nouvelle définition des principes qui sous-tendent la fédération;
- une nouvelle conception des rapports entre nos gouvernements;
- une nouvelle constitution.

## **L'affirmation de l'identité canadienne**

Le Canada nous a faits ce que nous sommes et nous a faits plus semblables que nous ne le croyons. Notre fonds commun est considérable. Nous partageons une histoire, un vaste territoire, une solidarité nationale, une éthique nord-américaine et les mêmes valeurs démocratiques. D'autres valeurs doivent cependant être intégrées à ce consensus. Elles ont trait à l'égalité linguistique, à la diversité des cultures, à la dignité des autochtones et à l'autonomie des régions. Nous devons non pas seulement accepter que les autres collectivités

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# **Le temps d'agir**

## **Sommaire des propositions du Gouvernement fédéral visant le renouvellement de la fédération canadienne**





# **Le temps d'agir**

**Sommaire des propositions  
du Gouvernement fédéral  
visant le renouvellement de  
la fédération canadienne**



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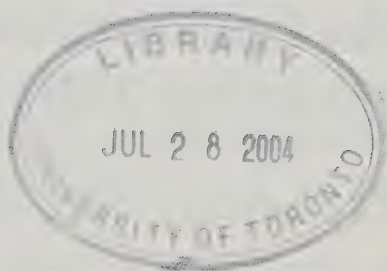
# The Constitutional Amendment Bill, 1978

## Explanatory Document



**Government  
of Canada**

**Gouvernement  
du Canada**



## Introduction

The Government of Canada, mindful of its responsibility to promote the cohesion and well-being of our Federation and all its parts, has introduced a bill that would modify the Constitution in many important ways. This document is intended to explain in non-legal language the main elements of the proposals in that bill. The reader interested in a more detailed explanation should refer to the bill itself, which has been published with clause by clause explanatory notes.\*

## Background

Ever since the Fathers of our Federation established the country Canada 111 years ago, the terms of their agreement have been evolving. But the framework of their accord has remained essentially the same as set out in the British North America Act of 1867.

This Act is one of the oldest federal instruments in the world and has endured through history's most turbulent period of nation building. However, as Canada approached its Centennial more than a decade ago, it was becoming apparent that our basic constitutional arrangements required review. The establishment of the Constitutional Conference in 1968 and continuing talks with the provinces over the following three years set the stage for a special effort to reach accord on limited changes in June, 1971 at Victoria, B.C. For various reasons, these efforts did not come to fruition.

In 1975, the Prime Minister proposed to the Premiers that an attempt be made to reach agreement on an amending formula and on bringing final control of the British North America Act home to Canada. The provinces responded with additional proposals for discussion in October, 1976 and a further set of federal

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\* Requests for copies should be addressed to P.O. Box 1986, Station "B", Ottawa, Ontario K1P 6G6



proposals was put forward in January, 1977. Even as these proposals were being formulated, however, it was becoming clear that a more fundamental review would be required. The feelings of many Quebeckers that their aspirations cannot be met within Canada, the feelings of isolation and estrangement in Western Canada, the heightened concerns of every region, the uncertainties that are adding seriously to our economic problems, are attributable, at least in part, to shortcomings in our Constitution.

The Government believes that the bill to amend the Constitution will be the first step in a renewal of Canada's political and federal structures and will mark the beginning of a process leading to a new and wholly Canadian Constitution, fully adequate to Canada's present needs and to the excitement and promise of its future.

## Main Elements

The main elements of the bill, which are discussed in more detail under separate sections, are these:

- *the Preamble and the Statement of Aims*—setting out for consideration by the people of Canada, a statement of our principles of nationhood and our goals as a national community;
- *the Charter of Rights and Freedoms*—including linguistic rights and guarantees of other basic rights and freedoms;
- *a House of the Federation*—a new legislative forum, designed to replace the Senate and to give more effective national representation to Canada's regions and provinces;
- *the Supreme Court*—including proposals for modifying and establishing the Court as an integral part of the Constitution and enhancing the role of the provinces in the appointment of Supreme Court justices;

- *the Mechanisms of Central Government*— setting out a new role for the Governor General and, for the first time, establishing in the Constitution, the function of the Prime Minister and the Cabinet. Also proposed are measures affecting federal-provincial relations, including the institutionalizing of First Ministers' conferences;
- *Symbols*—consisting of provisions that would give constitutional recognition to the flag, motto, and national and royal anthems.

## Implementation

In its policy paper, *A Time for Action*, the Government of Canada pledged itself to seek the implementation of constitutional changes in two phases—Phase I to be completed by July 1, Canada Day, 1979, and Phase II, by 1981, the 50th anniversary of Canada's accession, through the Statute of Westminster, to full independence and international sovereignty.

Each phase is intended to permit the fullest possible discussion and consideration of the proposals by Parliament, provincial governments and the public.

### Phase I

Under the present Constitution, Parliament can:

- amend the Constitution in matters affecting the central institutions of government, including the Senate and the Supreme Court;
- include such changes as the addition of a Preamble and a Charter of Rights and Freedoms, which thereafter would be binding on the Government of Canada. Acceptance by the provincial governments would, however, be necessary to achieve constitutional entrenchment. These provisions would then apply not only to all provinces but also could not be changed by any government acting on its own.

These are the kinds of matters which are covered in the new bill. Parliament will be asked soon to establish a joint committee of the House of Commons and the Senate to study the proposals. A Constitutional Conference of First Ministers is planned for early autumn, at which time the proposals will be discussed with the provinces. At that time, also, there will be an opportunity to discuss the possibility of reaching early agreement on an amending formula and bringing final control over the Constitution home to Canada.

## Phase II

This phase, which is also of great importance if renewal is to be achieved, would cover all those sections of the Constitution which require joint federal and provincial action: basically those involving the distribution of powers between the federal and provincial orders of government. The Constitutional Conference in the fall of 1978 will no doubt concern itself with the extensive planning which will be necessary if this complex review is to be successfully carried out over the next three years.

Passage of constitutional legislation is not contemplated for this session of Parliament. Rather, it is hoped, its introduction at this time will give further impetus to the renewal process which began with the tabling of the federal policy document, *A Time for Action*, and provide a basis for thorough discussion in Parliament and with provincial governments and the Canadian people.

## Preamble and Statement of Aims

So that the new Constitution may reflect the ideals of Canadians and the objectives of our nationhood, the Government has drafted a Preamble and Statement of Aims.

### The Preamble reads:

*The Parliament of Canada, affirming the will of Canadians to live and find their futures together in*

*a federation based on equality and mutual respect, embracing enduring communities of distinctive origins and experiences, so that all may share more fully in a freer and richer life;*

*Honouring the contribution of Canada's original inhabitants, of those who built the foundations of the country that is Canada, and of all those whose endeavours through the years have endowed its inheritance;*

*Welcoming as witness to that inheritance the evolution of the English-speaking and French-speaking communities, in a Canada shaped by men and women from many lands;*

*And being resolved that a renewal of the Canadian federation, guided by aims set forth in its constitution, can best secure the fulfilment of present and future generations of Canadians.*

**The Statement of Aims of the Canadian Federation reads:**

*To protect the fundamental rights of all Canadians and to promote the conditions of life under which their legitimate aspirations and essential worth and dignity may best be realized;*

*To ensure that its society is governed by institutions and laws whose legitimacy is founded upon the will and consent of the people; and to ensure, as well, that neither the power of government nor the will of a majority shall interfere in an unwarranted or arbitrary manner with the enjoyment by each Canadian of his or her liberty, security and well-being;*

*To pursue social justice and economic opportunity for all Canadians through the equitable sharing of the benefits and burdens of living in the vast land that is their common inheritance, through the commitment of all Canadians to the balanced development of the land of their common inheritance and to*

*the preservation of its richness and beauty in trust for themselves and generations to come, and through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them;*

*To expand the horizons of Canadians as individuals, and enhance their collective security and distinctiveness as a people, by affirming through their daily lives and governance the fundamental proposition of the new nationality created by their forbears, that is to say, the proposition that fraternity does not require uniformity nor need diversity lead to division; and as elements of that proposition:*

- i) to ensure throughout Canada equal respect for English and French as the country's principal spoken languages, and for those Canadians who use each of them;*
- ii) to ensure throughout Canada equal respect for the many origins, creeds and cultures and for the differing regional identities that help shape its society, and for those Canadians who are part of each of them; and*
- iii) inasmuch as the North American majority is, and seems certain to remain overwhelmingly English-speaking, to recognize a permanent national commitment to the endurance and self-fulfilment of the Canadian French-speaking society centred in but not limited to Quebec;*

*each of these elements reinforcing the others and lending strength to the distinctiveness of the Canadian nationality and of its contribution to the world community.*

### **Why has the Government proposed the addition of a Preamble and a Statement of Aims to the Constitution?**

The Government believes these will contribute to the full examination now taking place across Canada of



what it means to be a Canadian. From that examination, the Government hopes, will come a final formulation of values and goals for inclusion in the Constitution so that future generations may be inspired to share the profound love-of-country that Canadians hold in this time of renewal. The Preamble and Aims will also serve as a clear enunciation of the underlying principles and objectives of the Canadian Constitution for the guidance of legislators and courts.

### **How will the new Preamble and the Statement of Aims be incorporated into the Constitution?**

After Parliament has had a full opportunity to consider what is proposed, after discussions with the provincial governments have taken place and there has been time for public consideration, the Government will ask Parliament to enact the Preamble and Aims. Adoption by Parliament would make the Preamble and Aims applicable to Parliament itself, to the Government of Canada and to all federal institutions. When the provinces have also adopted them, the Preamble and Aims would be entrenched in the Constitution, beyond the power of any government to change unilaterally.

### **Does the Statement of Aims of the Canadian Federation recognize the aspirations of French-speaking Canadians?**

The Statement of Aims fully recognizes the linguistic rights of French-speaking Canadians. Ensuring equal respect for the French language throughout Canada is given as one of the basic objectives of the Federation. The Statement of Aims recognizes a permanent national commitment to the endurance and self-fulfilment of the French-speaking society in Canada.

### **Does the Statement of Aims mention anything about economic disparities between the regions of Canada?**

The answer is yes. It states as a fundamental goal of the principle of Canadian nationhood, the commitment

to eliminate unacceptable disparities. It indicates as well the commitment to pursue social justice and economic opportunity for all Canadians. The same thing applies to a "balanced development" for Canada. More specifically, it states the commitment to "overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them."

## Canadian Charter of Rights and Freedoms

Political philosophers and theorists have traditionally held that the primary purpose of government in a democratic society is to ensure the basic individual and collective rights of that society.

*...for without them man loses the peace, dignity, and power of self-expression which should be part of his unique heritage.\**

Today in Canada there are a number of basic rights and freedoms expressed in a variety of federal laws and provincial statutes. These rights and freedoms vary with legislation from province to province. With few and limited exceptions, none of those rights and freedoms are constitutionally guaranteed. What Parliament or provincial legislatures enacted yesterday, they can remove or restrict tomorrow.

The best means of ensuring that Canadians anywhere in Canada will always enjoy basic rights and freedoms is to place them in the Constitution, where they will be beyond change by Parliament or any provincial legislature acting unilaterally. Most of the rights and freedoms in the new Charter are drawn from existing provisions found in the BNA Act and in federal and provincial laws. These are, however, extended in a

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\* *The Constitution and the People of Canada*, Ottawa, 1969, p. 14

number of cases and there are a number of new rights which have been added.

## **Political and Legal Rights and Freedoms**

### **Freedom of thought, conscience and religion**

This provides, in addition to freedom of religion, freedom to have no religion, and, through the “freedom of thought” provision, safeguards against attempts at forced indoctrination.

### **Freedom of opinion and expression**

This re-wording of the traditional “freedom of speech” conveys not only the right to express one’s views, but equally the right to hold those views, even though others may not share them.

### **Freedom of peaceful assembly and association**

Ensures that there is no question about the right of demonstration or association for peaceful purposes in Canada and that the onus is on the Crown to prove that an assembly is for other than peaceful purposes.

### **Freedom of the press and other communications media**

Makes clear that other communications media, such as radio and television, are included under the concept of freedom to disseminate news and opinion.

### **Right to life, liberty and security of the individual**

Ensures that there will be no interference in these areas by the State, except by due process of law.

### **Right to use and enjoy property**

Ensures that there will be no deprivation of property by the State except in accordance with proper legal procedures.

### **Right to equal protection and equality before the law**

Designed to ensure the non-discriminatory application of laws and entitlement to all the protection the laws afford, such as fair trial, right to an interpreter, etc.

**Protection against arbitrary detention, imprisonment or exile**

Ensures that no individual in Canada may be held by police, placed in prison or exiled from Canada without lawful justification.

**Right to know reasons for arrest, right to consult counsel and to test validity of detention**

Protects against actions by law enforcement authorities which may infringe upon individual liberty.

**Right to security against unreasonable searches and seizures**

Protects against unjustified police examinations and confiscations.

**Right to refuse to testify without legal safeguards**

Assures a witness the right not to testify unless (1) given the opportunity to have counsel present; (2) assured that evidence used in one hearing would not be used in an unrelated hearing; (3) constitutional safeguards are assured, such as a fair and impartial trial.

**Right to assistance of an interpreter**

Guarantees any individual involved in any formal proceedings the right to an interpreter when proceedings are in a language that individual does not speak or understand.

**Right to a fair hearing**

Includes among others, the right to a public hearing by an impartial tribunal, the right to know the opponent's case, the right to examine witnesses and to make a full and complete defence.

**Rights of an individual charged with an offence**

Includes presumption of innocence, fair trial, reasonable bail, no retroactive justice and no punishment more severe than that prescribed for the offence at the time it was committed.

### **Protection against cruel and unusual punishment or treatment**

Designed to protect against inhuman forms of treatment or punishment.

## **Rights of Canadian citizens within Canada**

The Charter lists fundamental rights inherent in the status of Canadian citizenship: the right to reside in any province or territory in Canada, to move without unreasonable impediment from one province to another in Canada and to enjoy the same benefits of the law as other citizens who reside in that province, without unreasonable discrimination; and the right to own property and to seek a livelihood in any province even if residing in another, subject only to laws applying generally in that province.

### **Anti-discrimination provisions**

Protection against discrimination in the enjoyment of any right and freedom on grounds of race, national or ethnic origin, colour, religion, sex, language or age.

### **Free and democratic elections**

Guarantees free and democratic elections based on universal suffrage and non-discrimination, limits the lapse of time between elections to not more than five years (except in declared emergencies) and ensures that Parliament and the legislatures have at least one session during any 12-month period.

### **Language rights**

The bill would also guarantee protection of language rights. The Charter provides:

- the right to use either English or French as the official languages of Canada in Parliament and in all the legislatures, with statutes, records and journals being published in the two languages for Parliament, and in Ontario, Quebec and New Brunswick;



- protection of identifiable French-speaking or English-speaking communities anywhere in Canada against the reduction of their traditional rights and customs;
- the right of any individual to use English or French before the Supreme Court or any federal court and before the courts in Ontario, Quebec and New Brunswick, and before any court in Canada dealing with a criminal matter or with an offence under provincial law where imprisonment could result;
- the right of the public to use either official language in communicating with the head or central offices of federal departments or agencies, and in areas where numbers warrant, with other principal federal and provincial offices anywhere in Canada; and
- regarding the language of education, the right of any citizen who is not of the majority official language group in any province, to choose the minority language as the language for the education of his or her children, if the number of children in the area warrants the provision of education facilities in the minority language.

### **What are the “new” rights or freedoms in the Charter?**

Several important new rights are included, for example, with respect to the use of the English and French languages in Canada. Freedom of conscience and of thought have been added to the traditional freedom of religion. Protection against unreasonable searches and seizures and against the retroactive application of criminal sanctions has been added. The right of Canadian citizens to move from province to province, to own property and to work in another province would also be guaranteed for the first time. The right to vote and to stand for elective office without discrimination would be expressly assured as well.

## **Would the Charter be immediately applicable?**

Once adopted by Parliament, the Charter would come into effect for matters under federal jurisdiction. Matters relating to the jurisdiction of a province would be subject to the Charter only upon its adoption by that province. Joint action would be required by the federal and provincial governments to have the Charter entrenched i.e., its guarantees placed beyond change by any government acting on its own.

## **Section 133 of the BNA Act allows the use of either English or French by anyone before the courts in Quebec. Would Quebec be required to continue permitting the use of English in the courts, and what of French in Ontario and elsewhere?**

The new Charter proposes that the historic rights of the English-speaking communities in Quebec be continued. It also proposes that in the two other provinces, Ontario and New Brunswick, where substantial populations of French-speaking Canadians live, the same rights be extended for the use of French in the courts. Both these provinces are now making efforts in that direction. It should also be noted that, insofar as criminal matters within the jurisdiction of Parliament are concerned, or matters within provincial jurisdiction which could result in imprisonment, the Charter guarantees the right of persons giving evidence before any Canadian court to use either English or French.

## **How does the Charter deal with language rights, particularly the language of education?**

Citizens belonging to an official language minority could choose the minority language for the education of their children, where the number of such children warrants the establishment of teaching facilities. This right of choice would not apply to non-citizens, nor to citizens who are part of the official language majority. The Charter would, of course, in no way restrict the right of parents to have their children educated in the majority

language of a province. Nor would it in any way prohibit teaching or the use of the majority and minority languages, or indeed, of other languages. Nor would it restrict extension to all provincial residents of free choice of official language for education.

**Who will determine whether the number of children needing teaching facilities in the language of the minority groups in a province is sufficient to warrant these facilities?**

In the first instance, the provincial governments would make this determination. However, should there be any serious question as to whether such determinations are reasonable, an appeal could be made to the courts.

**Why is it necessary to include the question of language of education in the Charter? Would it not be best to have it dealt with by the provinces among themselves, through reciprocal arrangements?**

It is the Government's strongly held view that only through an amendment of the Constitution can Canadians be definitely assured that certain common basic language rights will be observed throughout the country. Reciprocal arrangements cannot guarantee against alterations as a result of short-term political or social changes, or against withdrawal at any time by any province which may consider that its commitment is no longer desirable.

**How would the new rights in the Charter affect existing provincial laws that do not conform to the new norms?**

Amendments might be required in such areas of provincial jurisdiction as language rights, education and the rights of Canadian citizens to move freely from province to province and to own property and seek employment in any province, regardless of residence. However, it must be emphasized that the aspects of the

Charter that pertain to matters under provincial jurisdiction would not come into effect until the Charter had been adopted by each of the provinces or included in the Constitution through the amendment procedure to be negotiated. At that time, it would be expected that each province would have adjusted its legislation to render it fully compatible with the Charter, as the courts would then have the mandate to declare unconstitutional any laws or regulations which did not conform.

**Besides the provisions regarding the two official languages, are there any protections for other languages used in Canada?**

The Charter stipulates that none of the specified rights and obligations respecting the French and English languages shall limit any other language right protected either by other provisions of the Charter (for example, the right to vote without discrimination based on language) or by any legal or customary right existing when the Charter becomes law or which may be added later by federal or provincial legislation. This is designed to preserve, for example, any rights or privileges to use a language such as Cree, Inuit dialects, Ukrainian or Polish in schools, public meetings, etc. Also, the Charter would guarantee the right to have an interpreter in all judicial proceedings.

**Why has no special provision been made for native rights?**

In a particular sense, special provision has been made. One provision of the Charter specifies that nothing in the Charter can take anything away from rights and freedoms previously acquired, including specifically those that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763. This will ensure that the native peoples, while gaining the added protection which all Canadians will enjoy through the adoption of the Charter, will not at the same time lose any other rights they now have. An elaboration of rights particular to the

native peoples could, of course, be added to the Charter, if at the close of ongoing discussions between governments and the native peoples, agreement is reached that this should be done.

## The House of the Federation

The Government proposes that the present federal Upper House be replaced by a House of the Federation designed to provide Canada's regions with more effective representation in the national legislative process.

At the time of Confederation, the role of the Senate in this legislative process was envisaged as one of representing Canada's regional interests and attitudes, thus counterbalancing the Lower House, which is based on representation by population. This followed the pattern of second chambers in other federal systems.

Most observers agree that while the Senate may have played a useful role in Parliament's legislative activity, it has not constituted an effective forum for the discussion of regionally-based concerns, and that such a forum is needed in Canada's central Parliament. That is why, at the second meeting of the Constitutional Conference in February, 1969, the federal Government urged that the Senate:

*...be reorganized to provide for the expression in it, in a more direct and formal manner than at present, of the interests of the provinces.\**

and that:

*...at the same time, the interests of the country as a whole should continue to find expression in the Senate to maintain there an influence for the unity of Canada.\*\**

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\* *The Constitution and the People of Canada*, 1969, p. 30

\*\* loc. cit.



After studying alternative means of achieving these goals, the Government now proposes that in place of the Senate there be created a House of the Federation in which (1) provincial and federal legislatures can each choose members, and (2) the distribution of seats would be weighted to ensure that all provinces and regions could be adequately heard in deliberations on federal legislation. Representation of the four Western Provinces and of Newfoundland would be increased, as compared with their share of seats in the present Senate.

Half the membership of the new House from any particular province would be chosen by the House of Commons after each federal election, in proportion to the popular support received in that province by the parties represented in the House of Commons. The other half of the membership for the province would be chosen by the provincial legislature following each provincial election, in proportion to the popular support received by the parties represented in the legislature. Thus, the new House would contain representatives of all major federal and provincial political parties from across the country.

Different members of the House of the Federation would therefore be appointed at different times: members chosen by the Commons would be appointed following each federal election. Similarly, members chosen by the provinces would be appointed following provincial elections.

The new House would be able to exercise a "suspensive" veto, i.e., have the power to delay government legislation by a negative vote for at least two months. Members would also be able to initiate their own bills, except money bills, and the new House would have to approve appointments of Supreme Court judges and heads of certain federal agencies and crown corporations. As well, members could be selected to serve as federal Cabinet ministers.



The House of the Federation would also have a special function as guardian of the status of the English and French languages in Canada. Before measures affecting that status, i.e., "measures of special linguistic significance" could be passed by the House, they would require approval by a majority of English-speaking and a majority of French-speaking members. This "double majority" principle is designed to reflect the concern of Canada's two major linguistic communities, particularly, of course, the French-speaking community, that their respective languages continue to play a vital role in their daily lives. Furthermore, if a measure of this kind were to be passed by the House of Commons and then fail to receive approval of the "double majority" in the Upper House, it could not become law without being passed by the Commons again, this time by a two-thirds majority.

The powers and composition of the House are designed to attract good members and to provide an effective forum for the regions in the conduct of national affairs. The opportunity for provincial representatives to consider federal legislation, and to ratify appointment of Supreme Court judges and heads of central institutions, should help to bring federal and provincial interests closer together and foster greater co-operation and understanding between each order of government. For these reasons, the Government believes this new regional forum would help improve significantly the functioning of Canada's federal system.

### **What is the purpose of the new House of the Federation?**

To provide an effective forum for the expression and protection of regional and provincial interests and concerns.

### **What would be the composition of the new House?**

There would be 118 representatives, 58 chosen by the House of Commons after each national election and

58 by the provincial legislatures, each of the latter making its choice of representatives following a provincial election. There would also be one representative each from the Yukon and Northwest Territories chosen by the Governor General in Council following each territorial election and after consultation with territorial Council members.

**What are the proposed changes to the distribution of seats in the new House of the Federation?**

With the proposed changes, no province or region would lose any seats, and representation from Quebec and Ontario would remain, as in the past, at 24 each. The Western Provinces, on the other hand, would now have almost a third of all seats, as compared with less than a fourth in the present Senate (rising from a total of 24 to a total of 36). The Atlantic Provinces' total would be raised from 30 to 32 to give proportionately fairer representation in the region to Newfoundland. The Yukon and Northwest Territories would continue with one representative each.

**Could the members of the House of the Federation also be members of Parliament or of provincial legislatures?**

No. This is to ensure that members of the House of the Federation have sufficient time and energy to fulfil their mandate.

**Why not let provincial legislatures choose all the members?**

If the new House is to function as intended, it must express regional viewpoints—not only those of the provincial legislatures but also of the members of the federal Parliament who themselves represent Canadians of every region.

**Could they be selected for a second term?**

Yes. No limit is proposed on the number of times a person might be selected.

childhood and still speak it, and who notify the Speaker of the House of the Federation to that effect, would constitute the members of the French-speaking group. The other members of the House would then form the English-speaking group.

**Surely this “double majority” arrangement is meaningless when, in the final analysis, the English-speaking majority in the House of Commons will have its way?**

True, the House of Commons could, by a two-thirds majority vote, force passage of a measure which had failed to pass the House of the Federation. This arrangement recognizes the ultimate supremacy of the House of Commons, a principle deeply rooted in our traditions, and the Government does not suggest that it be changed.

Nevertheless, there is significant protection against irresponsible use of this supremacy: one, the “double majority” requirement, ensuring that French-speaking members can fully and publicly express their views, and two, the requirement that any move to override the House of the Federation be supported by two-thirds of the voting members of the House of Commons. If in spite of these protections, a law should pass which adversely affected the preservation of the language spoken or otherwise enjoyed by any substantial, identifiable French or English linguistic community, there would be the possibility of the law being challenged under the Charter of Rights and Freedoms.

**How would the House of the Federation and the House of Commons function together?**

The House of the Federation would have the power to delay legislation for at least two months through the suspensive veto. Compromise, involving changes to legislation, would therefore have to be reached between the two Houses to avoid such delays. This is intended to ensure that regional interests are recognized.

## **Why not have direct elections for the House of the Federation?**

This can work in a congressional system based on the separation of powers, such as that of the United States. In the parliamentary system, however, the Government can only govern so long as it enjoys the confidence of the House of Commons. The elected members of Parliament are, in that sense, supreme. Having two elected Chambers could confuse the issue of where ultimate responsibility should lie, and always leave questions open about the supremacy of the House of Commons. The Government believes it would be wiser to have members of the new House selected by members of the House of Commons and provincial legislatures who have themselves been elected by the people in accordance with our democratic traditions.

## **The Supreme Court**

The Supreme Court of Canada is the highest court in the land. Its jurisdiction covers all matters of constitutional, federal and provincial law.

Although one of Canada's basic institutions, it exists only by virtue of a federal law (The Supreme Court Act) that any majority in Parliament could repeal or change.

In order to provide a more appropriate status for the Court, the Government intends to make its composition, organization and role part of the Constitution of Canada, beyond the capacity of any single government to change unilaterally.

This change in the status of the Court is particularly important in view of the Government's intention to enshrine a Charter of Rights and Freedoms in the new Constitution. It would be the Court's new and heavy responsibility to apply and interpret that Charter in keeping with the spirit of the new Constitution.

The Government also intends to ensure that the Court adequately reflects Canada's regional diversity by (i) increasing the number of judges to 11 to permit a more balanced regional distribution of judges and (ii) providing provincial governments with a voice in nominations and appointments.

In this connection, it is proposed that there be four Supreme Court judges from the Quebec Bar, one more than now. The remaining seven positions would be filled so that there would always be at least one judge from each of four areas: the Atlantic Provinces, Ontario, the Prairie Provinces, and British Columbia.

Appointment to the Supreme Court would be made subsequent to agreement between the federal government and the relevant province. If no agreement is reached, then an impartial nominating council would be responsible for selection. The person finally selected would have to be approved by the proposed House of the Federation where provincial interests would be represented.

The Court would continue to be the general Court of Appeal of Canada. However, the judges of the Court appointed from the Quebec Bar would be the sole judges of questions relating to Quebec civil law.

These changes are intended to enhance the unique role of the Supreme Court of Canada as an integral part of Canada's federal system. Strengthening the position of the Court in this manner will help to ensure that it remains a court of law based on the soundest traditions of the judicial process rendering justice freely and equitably, whether between citizen and citizen, citizen and government or government and government.

### **Why include the role and jurisdiction of the Supreme Court in the Constitution?**

To provide basic protection against arbitrary modification to one of the fundamental institutions of the



Canadian Federation. This is especially important when we consider the primary role of the Court as the guardian and final arbiter of the Constitution and its Charter of Rights and Freedoms.

### **When will the provisions on the Supreme Court be incorporated into the Canadian Constitution?**

Passage of the bill would make the basic provisions concerning the Supreme Court part of the Canadian Constitution, but still subject to change by Parliament. "Entrenchment"—that is, guaranteeing that these provisions could not be changed by Parliament acting on its own—would be achieved once provinces have indicated their support for the provisions and a formal constitutional amendment procedure has been put in place.

### **Why is it necessary to enlarge the Supreme Court and to provide for a provincial role in appointments?**

Much of the present crisis of federalism can be traced, the Government believes, to the growing dissatisfaction of Canada's regions with their inability to influence or affect national policies and institutions. These changes relating to the Supreme Court are among several constitutional changes designed to meet those dissatisfactions without unduly weakening Canada's central administration.

Regional balance has always to some degree affected the composition of the Supreme Court. The growing self-consciousness of Canada's regions now makes it necessary to provide more explicitly for regional balance and influence. This should meet the arguments of those Canadians who feel that the Court would thereby be better able to perceive the diversity of regional concerns across Canada. However, it is expected that judges will continue to make their decisions on the basis of conscience and legal considerations. They are not expected to become their regions' advocates.



## Mechanisms of Central Government

Some changes of function are proposed for the Governor General, and a change of title for the Privy Council for Canada. Other changes include a description of the role of Cabinet, institutionalizing the conferences of First Ministers and other provisions respecting federal-provincial relations.

*The Office of the Governor General* should be altered, the Government believes. Except when the Queen is in Canada, the Governor General now exercises all the prerogatives, functions and authority belonging to the Queen in respect of Canada. Under the bill, he would continue to represent the Queen and to act for her. However, his authority to do this would, in future, flow from the Constitution itself. In addition, Parliament would henceforth be made up of the Governor General and the two Houses and laws would be passed in his name. Only Canadian citizens would be eligible for this appointment. These changes are intended to enhance the dignity of the office. At the same time, the Queen remains as always the sovereign head of Canada. She would continue to appoint the Governors General and to exercise her full powers when in Canada.

*The Title of Council of State* would replace that of the Privy Council for Canada, in order to reflect more clearly the function of the Council, which is to advise the Governor General.

*The Functions of Cabinet* are, for the first time, to be set out in the Constitution to give formal recognition to that body as a vital element in Canada's system of government. The Cabinet is a committee of the Council of State, consisting of the Prime Minister and ministers (who must be members of one of the Houses of Parliament or qualified to be a candidate for the House of Commons), which may exercise the powers, duties and functions of the Council of State. The Cabinet is responsible to the House of Commons for the management and direction of the Government of Canada and must have

the confidence of the House of Commons. The proposed new Constitution sets out the traditional alternatives for action should the Cabinet lose the confidence of the House of Commons.

*Provisions for the Conferences of First Ministers and Other Federal-Provincial Matters* are also proposed under the bill. Four changes are suggested: that there should be (i) constitutional provision for an annual conference of First Ministers, (ii) the power of the federal government to “declare” any work—even if wholly situated within a province—to be for the general welfare of Canada and therefore under the jurisdiction of Parliament would be subject to prior consultation with the province concerned, (iii) the appointment of each Lieutenant Governor would be subject to advance consultation with the province concerned, and (iv) provision would be made so that assurance could be given against sudden termination of statutory payments to provinces by creating a binding obligation on the Parliament of Canada that whenever those payments are made subject to Constitutional Article 99, they could not be altered or discontinued arbitrarily.

## **Symbols**

The bill would add a new section to the Constitution recognizing the flag, the national and royal anthems and the motto as follows:

- the red and white flag with the red maple leaf (the current Canadian flag);
- “O Canada”, the national anthem, and “God Save The Queen”, the royal anthem;
- Canada’s motto, “A mari usque ad mare” (From Sea to Sea).



**Government  
of Canada**

**Gouvernement  
du Canada**







## Symboles

Le projet de loi ajouterait à la Constitution une nouvelle partie où seraient reconnus le drapeau, les hymnes national et royal et la devise du Canada, selon ce qui suit:

- Le drapeau rouge et blanc avec la feuille d'érable rouge;
- «O Canada» serait l'hymne national, «God Save The Queen», l'hymne royal;
- La devise du Canada serait «A mari usque ad mare» (D'un océan à l'autre).

du Conseil d'Etat, formé du Premier ministre et de ministres qui sont membres de l'une des Chambres du Parlement ou qui ont les qualités requises pour être candidats à un siège à la Chambre des communes. Il peut exercer les pouvoirs, responsabilités et fonctions du Conseil d'Etat et il est responsable de l'administration et de la direction du Gouvernement du Canada devant la Chambre des communes, dont il doit avoir la confiance. Telle que proposée, la nouvelle Constitution établit les recours traditionnels au cas où la Chambre retirerait sa confiance au Cabinet.

Le projet de loi prévoit en outre des *dispositions relatives aux conférences des premiers ministres et autres questions fédérales-provinciales*. Il propose quatre modifications: i) que la Constitution prévoio la tenue d'une conférence annuelle des premiers ministres, ii) que le pouvoir du gouvernement fédéral de «déclarer» qu'une question—même si elle a rapport particulièrement à une province—intéresse l'ensemble du pays et, en conséquence, qu'elle relève de la compétence du Parlement, fasse l'objet de discussions préalables avec les provinces concernées, iii) que la nomination de chaque lieutenant-gouverneur fasse d'abord l'objet d'une consultation avec la province concernée, et iv) que des dispositions assurent les provinces contre la cessation soudaine des paiements statutaires en empêchant le Parlement du Canada de les modifier ou de les discontinuer arbitrairement lorsque ces paiements sont assujettis aux dispositions de l'article 99 de la Constitution.

qu'ils continuent à prendre leurs décisions d'après ce que leur dicte leur conscience et à partir de considérations juridiques. On n'attend pas d'eux qu'ils se fassent les avocats de leur région.

## Les mécanismes du Gouvernement central

Le projet de loi propose de modifier la charge du gouverneur général et de changer le titre du Conseil privé du Canada. Il propose aussi de définir le rôle du Cabinet, d'ériger en institution les conférences des premiers ministres et d'effectuer certains autres changements dans les relations fédérales-provinciales.

Le Gouvernement considère que la *charge du gouverneur général* devrait être redéfinie. Sauf lorsque la Reine est au Canada, le gouverneur général jouit aujourd'hui de toutes les prérogatives et exerce toutes les fonctions et tous les pouvoirs de la Reine à l'égard du Canada. Aux termes du projet de loi, il continuerait d'être investi de ces mêmes pouvoirs à titre de représentant de la Reine. Toutefois, son mandat pour ce faire devrait, à l'avenir, dériver de la Constitution même. De plus, le Parlement serait composé dorénavant du gouverneur général et des deux Chambres et les lois seraient promulguées en son nom. Seuls les citoyens canadiens seraient éligibles à ce poste. Les modifications proposées ont pour objet de relever le prestige rattaché à ce poste. Toutefois, la Reine demeure, comme toujours, la souveraine du Canada; elle continue de désigner les gouverneurs généraux et peut toujours exercer ses pleins pouvoirs lorsqu'elle est au pays.

*Le titre de Conseil d'Etat* remplacerait celui de Conseil privé pour le Canada, ce titre étant plus approprié à notre époque et ayant un sens plus clair.

*Les fonctions du Cabinet* seraient définies pour la première fois dans la Constitution qui reconnaît ainsi officiellement l'importance vitale de cet organisme dans le régime gouvernemental canadien. Le Cabinet est un comité

Cour suprême, qui est celui d'être le gardien et l'arbitre ultime de la Constitution et de la Charte des libertés et droits fondamentaux.

**Quand les dispositions relatives à la Cour suprême seront-elles incorporées dans la Constitution?**

L'adoption du projet de loi aurait pour effet d'incorporer dans la Constitution du Canada les principales dispositions relatives à la Cour suprême, lesquelles demeureront sujettes à une modification par le Parlement. La «consécration» elle-même—c'est-à-dire la garantie que ces dispositions ne pourraient être modifiées unilatéralement par le Parlement—pourrait se faire dès que les provinces auraient signifié leur appui sur les dispositions, et qu'une formule d'amendement constitutionnel aurait été adoptée.

**Pourquoi est-il nécessaire d'élargir les cadres de la Cour suprême et de donner aux provinces voix au chapitre dans les nominations?**

D'après le Gouvernement, la crise que connaît actuellement le fédéralisme est pour une bonne part imputable à l'insatisfaction croissante des diverses régions du Canada qui se voient impuissantes à influencer ou à modifier les politiques et institutions nationales. Ces remaniements de la Cour suprême s'inscrivent dans toute une gamme de changements constitutionnels destinés à résoudre cette insatisfaction sans affaiblir indûment l'administration centrale du Canada.

On a toujours visé, dans une certaine mesure, à l'équilibre dans la représentation des régions au sein de la Cour suprême. L'affirmation croissante des diverses régions du Canada fait qu'il est nécessaire d'ajouter des dispositions concrètes quant à l'équilibre et à l'influence de la représentation régionale à la Cour. Cette mesure devrait satisfaire les représentations des Canadiens qui soutiennent qu'un tribunal plus représentatif serait mieux en mesure de percevoir la diversité des préoccupations des différentes régions du pays. Cependant, il va de soi qu'on attend des juges

onze, afin de permettre une distribution régionale mieux équilibrée des juges, ii) d'autre part, en donnant aux gouvernements provinciaux voix au chapitre quant à la proposition de candidats et à leur nomination.

À cet égard, le projet de loi propose que la Cour suprême compte quatre juges appartenant au barreau du Québec, soit un de plus qu'à l'heure actuelle. Les sept autres postes seraient assignés de sorte que la Cour compte toujours au moins un juge des provinces de l'Atlantique, un de l'Ontario, un des Prairies et un de la Colombie-Britannique.

Les nominations à la Cour suprême résulteraient d'une entente entre le gouvernement fédéral et celui de la province intéressée. À défaut d'entente, il y aurait convocation d'un comité impartial chargé de désigner un candidat. Cette désignation devrait ensuite être approuvée par l'éventuelle Chambre de la Fédération, au sein de laquelle les intérêts des provinces seraient adéquatement représentés.

La Cour suprême continuerait d'être la cour générale d'appel du Canada. Toutefois, les juges issus du barreau du Québec seraient les seuls habilités à statuer sur les questions se rapportant au Code civil du Québec.

Ces changements visent à renforcer le rôle unique de la Cour suprême en tant que partie intégrante du régime fédéral canadien. Ce renforcement de la position de la Cour permettra de faire en sorte qu'elle continue de rendre la justice sans contrainte et équitablement en s'appuyant sur les traditions judiciaires les plus saines, et ce, pour les causes concernant deux citoyens, deux gouvernements ou un citoyen et un gouvernement.

**Pourquoi consacrer dans la Constitution le rôle et les compétences de la Cour suprême?**

Pour assurer la protection fondamentale contre toute modification arbitraire de l'une ou l'autre des institutions essentielles de la Fédération canadienne. Ceci est particulièrement important si l'on songe au rôle premier de la

des communes. Dans ce sens, les membres élus du Parlement ont la suprématie. Le fait d'avoir deux Chambres électives pourrait compliquer la question de savoir à qui appartient la responsabilité ultime, et laisser planer le doute quant à la suprématie de la Chambre des communes. Le Gouvernement estime qu'il est beaucoup plus sage de faire élire les membres de la nouvelle Chambre par les membres de la Chambre des communes et des assemblées législatives provinciales, qui ont eux-mêmes été élus par le peuple conformément à nos traditions démocratiques.

## La Cour suprême

La Cour suprême est la plus haute instance judiciaire du Canada. Elle a la compétence pour juger toutes les questions relatives à la Constitution et aux lois fédérales et provinciales.

Bien qu'elle soit l'une des institutions fondamentales du Canada, la Cour suprême n'existe pourtant qu'en vertu d'une loi fédérale (Loi sur la Cour suprême) que le Parlement pourrait abroger ou modifier à la suite d'un vote majoritaire.

Afin de conférer à la Cour suprême un statut convenant mieux à ses attributions, le Gouvernement entend intégrer à la Constitution du Canada des dispositions relatives à la composition de la Cour suprême, à son organisation et à son rôle, dispositions que nul gouvernement ne serait en mesure de modifier unilatéralement.

Cette révision du statut de la Cour suprême est particulièrement importante vu l'intention du Gouvernement d'incorporer dans la Constitution une charte des droits et des libertés. La Cour se verra ainsi attribuer une responsabilité nouvelle, à savoir celle d'appliquer et d'interpréter la Charte conformément à l'esprit de la nouvelle Constitution. Le Gouvernement compte aussi faire en sorte que la Cour suprême reflète mieux la diversité régionale du Canada, y) d'une part, en portant le nombre des juges à



Ce système de double majorité n'a assurément aucun sens, car, en dernière analyse, n'est-ce pas la majorité anglophone de la Chambre des communes qui aura le dernier mot?

Il est vrai que la Chambre des communes pourrait, par une majorité de deux tiers des voix, imposer une mesure qui aurait été repoussée par la Chambre de la Fédération. Ce système reconnaît la suprématie ultime de la Chambre des communes, dont le principe est profondément enraciné dans nos traditions, et le Gouvernement ne propose pas de la modifier.

Néanmoins, nous sommes bien protégés contre l'abus éventuel de cette prérogative: d'abord, la «double majorité» garantit aux membres francophones la pleine liberté d'expression publique de leurs vues; ensuite, toute démarche visant à renverser une décision de la Chambre de la Fédération doit être appuyée par les deux tiers des membres votants de la Chambre des communes. Et si, malgré tout, on devait adopter une loi qui risquerait de porter préjudice à la langue parlée ou utilisée par un groupe important et identifiable de francophones ou d'anglophones, on pourrait toujours la contester en se réclamant de la Charte des droits et libertés fondamentaux.

**Comment la Chambre de la Fédération et la Chambre des communes fonctionneraient-elles ensemble?**

La Chambre de la Fédération aurait le pouvoir de retarder des lois grâce à son droit de «veto suspensif» et ce, pour une période d'au moins deux mois. Afin d'éviter de tels retards, les deux Chambres pourraient avoir recours à des compromis supposant la modification des lois. Cette disposition vise à tenir compte des intérêts des régions.

**Pourquoi ne pas tenir de vraies élections pour la Chambre de la Fédération?**

Cela peut se faire dans un régime congressionnel fondé sur la séparation des pouvoirs, comme c'est le cas aux Etats-Unis. Mais dans un régime parlementaire, le Gouvernement ne peut gouverner qu'avec l'appui de la Chambre

se faire entendre à la Chambre des communes, puis que la députation est proportionnelle à la population.

**L'augmentation des sièges prévus pour les provinces de l'Ouest et de Terre-Neuve n'aurait-elle pas pour effet de restreindre l'influence relative du Québec dans la nouvelle Chambre?**

Pas de façon significative. Le Québec (tout comme l'Ontario) disposerait d'un nombre relativement moins élevé de sièges à la nouvelle Chambre qu'au Sénat. Cependant, les représentants du Québec compteraient pour beaucoup plus de la moitié des membres francophones de la nouvelle Chambre et formeraient donc une majorité au sein du groupe francophone. Or, ce groupe doit approuver toutes les mesures de portée linguistique spéciale.

**N'est-il pas dangereux que l'idée de la «double majorité» relative aux mesures linguistiques divise les francophones et les anglophones en deux groupes rivaux?**

Au contraire, ce système de double majorité, en protégeant mieux les droits linguistiques des usagers de l'autre langue officielle du Canada, favorisera probablement la collaboration et la confiance. Cette mesure vise particulièrement à donner aux francophones la pleine assurance que, lorsque le Parlement du Canada légifèrera en matière de langues, leurs besoins ne seront pas ignorés par une majorité de parlementaires anglophones.

**En ce qui concerne cette double majorité, comment les membres anglophones et francophones de la Chambre de la Fédération signifieraient-ils leur appartenance à un groupe ou à l'autre?**

Le projet de loi propose que les membres dont le français est la langue principale, ou qui ont appris cette langue dans leur enfance et la parlent encore, et qui en ont informé en conséquence le président de la Chambre de la Fédération, constitueraient le groupe francophone. Les autres membres de la Chambre formeraient le groupe anglophone.

jusqu'à leur remplacement, à la suite d'élections. Le pourcentage maximal des représentants qui seraient susceptibles d'être remplacés à la suite d'une élection—par exemple, après une élection en Ontario ou au Québec, provinces qui compteraient le plus grand nombre de membres—s'établirait au plus à 10 p. 100 de l'ensemble des membres de la Chambre.

**Le gouvernement pourrait-il nommer des membres de la Chambre de la Fédération au Cabinet fédéral?**

Oui, dans des circonstances exceptionnelles, s'il n'y avait pas suffisamment de députés ministriables en provenance d'une région donnée. Les ministres ainsi nommés pourraient répondre aux questions et participer aux débats de la Chambre des communes (avec la permission du président et de la Chambre) sans y avoir, évidemment, le droit de vote.

**Les conférences fédérales-provinciales seraient-elles encore nécessaires?**

Oui. Le travail accompli dans le cadre des conférences et des négociations fédérales-provinciales demeurerait essentiel. Le Gouvernement propose même que la nouvelle Constitution rende obligatoire les conférences annuelles des premiers ministres. En même temps que les conférences tenues aux différents paliers continueraient de jouer un rôle important dans le système fédéral canadien, la Chambre de la Fédération, comme nouvelle institution politique de grande importance, favoriserait encore davantage la conciliation des différences interrégionales.

**Les régions moins peuplées seraient-elles adéquatement représentées à la Chambre de la Fédération?**

C'est l'un des buts que poursuit le Gouvernement en créant cette Chambre. Essentiellement, la répartition des sièges serait à l'avantage des sept provinces les moins peuplées. Il s'agit de faire contrepois à la représentation des provinces les plus peuplées, qui sont certaines de bien

Non, pas de façon significative. Les membres nommés par les provinces continueraient de remplir leurs fonctions

**Les travaux de la Chambre de la Fédération ne risquent-ils pas d'être interrompus à l'occasion de chaque élection fédérale et provinciale?**

Oui. Aucune limite n'est prévue quant au nombre des mandats qu'une même personne pourrait se voir confier.

**Les représentants de la nouvelle Chambre pourraient-ils être nommés pour un second mandat?**

Pour que la nouvelle Chambre remplisse le mandat prévu, elle se doit d'exprimer les vues des régions, c'est-à-dire non seulement celles des assemblées législatives provinciales, mais aussi celles des parlementaires fédéraux qui représentent également les Canadiens de toutes les régions.

**Pourquoi les assemblées législatives provinciales ne peuvent-elles pas choisir tous les membres de la Chambre de la Fédération?**

Non. On veut s'assurer que les membres de la Chambre de la Fédération aient tout le temps et toute l'énergie nécessaires pour bien s'acquitter de leurs fonctions.

**Les représentants nommés à la Chambre de la Fédération pourraient-ils faire partie du Parlement ou des assemblées législatives provinciales?**

et de l'Ontario demeurerait la même que par le passé, soit 24 sièges chacun. Par ailleurs, les provinces de l'Ouest disposeraient de près du tiers de l'ensemble des sièges, comparativement à moins du quart au sein du Sénat actuel (le nombre des représentants passerait donc de 24 à 36). Quant aux provinces de l'Atlantique, le nombre total de leurs sièges serait porté de 30 à 32 afin d'assurer à Terre-Neuve une représentation proportionnellement plus équitable. Le Yukon et les Territoires du Nord-Ouest continueraient de disposer d'un représentant chacun.

majorité à la nouvelle Chambre ne pourrait être sanctionnée sans avoir été adoptée de nouveau par les Communes, cette fois à la majorité des deux tiers.

Les pouvoirs et la composition de la nouvelle Chambre visent à attirer des représentants de grande qualité et à offrir aux régions une voix efficace dans la conduite des affaires du pays. Tout en ayant l'occasion d'examiner la législation fédérale, de sanctionner la nomination des juges de la Cour suprême et des chefs de certains organismes centraux, ainsi que d'étudier les projets de lois fédéraux, les représentants des provinces pourront aider à réconcilier les intérêts du gouvernement fédéral et des gouvernements provinciaux et à favoriser une plus grande compréhension et une collaboration plus étroite entre les différents niveaux de gouvernement. Pour toutes ces raisons, le Gouvernement est d'avis que cette nouvelle tribune à vocation régionale devrait contribuer à améliorer sensiblement le fonctionnement du régime fédéral canadien.

### **Quel est le but de la nouvelle Chambre de la Fédération?**

Offrir une tribune efficace pour l'expression et la protection des intérêts et des préoccupations des provinces et des régions.

### **Quelle serait la composition de la nouvelle Chambre?**

La Chambre compterait 118 membres dont 58 seraient choisis par la Chambre des communes après chaque élection fédérale et 58 par les assemblées législatives des provinces après chaque élection provinciale. Le Yukon et les Territoires du Nord-Ouest disposeraient aussi d'un représentant chacun, lequel serait désigné par le gouverneur général en conseil à la suite de chaque élection territoriale et suivant consultation auprès des membres du conseil territorial.

### **Quels changements propose-t-on dans la répartition des sièges de la nouvelle Chambre de la Fédération?**

En vertu des changements apportés, aucune province ni région ne perdrait de sièges, et la représentation du Québec



proportionnellement à l'appui populaire reçu dans la province par les partis représentés à la Chambre des communes. De même, l'autre moitié des sièges attribués à chacune des provinces serait comblée par les assemblées législatives, après chaque élection provinciale, proportionnellement à l'appui populaire reçu par les partis composant le corps législatif de la province. Ainsi en arriverait-on à une représentation à la nouvelle Chambre de tous les partis fédéraux et provinciaux importants du pays.

Les membres de la Chambre de la Fédération seraient donc nommés à intervalles différents: ceux dont la nomination relèverait de la Chambre des communes seraient choisis à la suite de chaque élection fédérale et les membres désignés par les provinces seraient nommés à la suite des élections provinciales.

La nouvelle Chambre pourrait exercer un droit de veto «suspensif», c'est-à-dire qu'elle aurait le pouvoir de retarder, au moyen d'un vote négatif, toute législation gouvernementale et ce, pour une période d'au moins deux mois. Ses membres pourraient également prendre l'initiative de projets de loi, à l'exception de ceux portant affectation de crédits, et d'approuver la nomination des juges de la Cour suprême ainsi que des chefs de certains organismes fédéraux et sociétés de l'Etat. De même, ses membres pourraient être appelés à occuper des postes ministériels au sein du Cabinet fédéral.

En outre, la Chambre de la Fédération serait investie d'une fonction spéciale, soit celle de gardienne du statut du français et de l'anglais au Canada. Avant de pouvoir adopter des mesures dans ce domaine (c'est-à-dire des «mesures de portée linguistique spéciale»), il lui faudrait obtenir l'assentiment de la majorité de ses membres francophones et de la majorité de ses membres anglophones. L'objet de cette «double majorité» est de refléter le souci des deux principales collectivités linguistiques du pays, particulièrement la collectivité francophone, de voir à ce que leur langue respective continue de jouer un rôle essentiel dans leur vie quotidienne. En outre, une mesure de ce genre qui, après avoir été approuvée par la Chambre des communes, ne recevrait pas l'assentiment de la double



deuxièmes chambres telles qu'on les retrouve dans les autres systèmes fédéraux.

La plupart des observateurs conviennent que quoique le Sénat ait pu jouer un rôle utile dans l'activité législative du Parlement, il n'a réellement pas constitué le cadre où discuter des préoccupations des régions et que le Parlement du Canada a besoin d'un tel cadre. C'est pourquoi, lors de la deuxième réunion tenue dans le cadre de la Conférence constitutionnelle, à Ottawa, en février 1969, le Gouvernement fédéral a insisté pour que le Sénat

«... (soit réorganisé) de façon à ce que les intérêts des provinces et des régions y soient plus formellement et mieux représentés» \*

et que

«... en même temps les intérêts du pays pris dans son ensemble (...) continuent d'y être représentés afin que le Sénat puisse contribuer à maintenir et à développer un sens d'unité canadienne». \*\*

Après avoir étudié d'autres moyens d'atteindre ces objectifs, le Gouvernement propose de remplacer le Sénat par une Chambre de la Fédération, 1) dont les membres seraient choisis par les corps législatifs fédéral et provinciaux, et 2) dont les sièges seraient répartis de manière à ce que les vues de toutes les provinces et régions puissent être bien représentées lors des délibérations sur les projets de lois fédéraux. De même, la représentation des quatre provinces de l'Ouest ainsi que de Terre-Neuve se verrait augmentée, comparativement au nombre de sièges que ces provinces détiennent présentement au Sénat.

Le choix de la moitié des représentants de chacune des provinces appartiendrait à la Chambre des communes à la suite de chaque élection fédérale, les sièges étant comblés

\* *La Constitution canadienne et le citoyen*, 1969, p. 31

\*\* loc. cit.

Au moment de la Confédération, on envisageait le Sénat comme le représentant, à la législature, des intérêts et des vues des diverses régions du pays, faisant ainsi le juste équilibre avec le principe de la représentation selon la population de la Chambre basse. Il était modelé sur les

Le Gouvernement propose de substituer à l'actuelle Chambre haute une Chambre de la Fédération, qui permettrait aux différentes régions du pays d'être mieux représentées à l'intérieur de la législature canadienne.

## La Chambre de la Fédération

D'une certaine façon, il existe une disposition spéciale puisque la Charte stipule qu'elle n'infirme en rien les droits et libertés déjà acquis, en particulier ceux qui ont été conférés aux autochtones en vertu du Décret royal du 7 octobre 1763. Non seulement les autochtones sont-ils assurés eux aussi de bénéficier des nouvelles mesures de protection dont jouiraient tous les Canadiens par l'adoption de la Charte, mais ils ne perdront aucun autre droit qu'ils possèdent déjà. Il est entendu qu'on pourrait ajouter à la Charte une définition élaborée des droits des autochtones si, à la suite des discussions en cours entre les gouvernements et les populations autochtones, il était convenu qu'il serait souhaitable de procéder ainsi.

## Pourquoi n'y a-t-il aucune disposition spéciale concernant les droits des autochtones?

autre droit linguistique protégé soit par d'autres dispositions de la Charte (tel que le droit de voter sans discrimination de langue), soit par des droits juridiques ou d'usage qui prévaudraient au moment où la Charte prendra force de loi ou qui pourraient être ajoutés par la suite par une législation fédérale ou provinciale. Cette stipulation a pour objet de préserver, par exemple, les droits et privilèges de s'exprimer en cri, en dialecte inuit, en ukrainien ou en polonais à l'école, dans des réunions, etc. . . . La Charte garantit aussi le droit de recourir aux services d'un interprète dans le cas de procédures juridiques.

La Charte stipule que les droits et obligations touchant l'anglais et le français ne doivent en aucun cas affecter tout

**Outre les dispositions concernant les deux langues officielles, quelle protection existe-t-il pour les autres langues?**

Des amendements pourront devoir être apportés dans des domaines de compétence provinciale, en ce qui concerne, par exemple, les droits linguistiques, les droits relatifs à la langue d'enseignement, le droit pour tout Canadien de déménager à sa guise d'une province à l'autre, d'acquiescer des biens et de chercher un emploi dans n'importe quelle province, peu importe où il réside. Cependant, il est bon de mettre l'accent sur le fait qu'aucun point de la Charte relatif à des questions de compétence provinciale n'entrera en vigueur tant que chaque province n'aura pas adopté la Charte ou que celle-ci n'aura pas été insérée dans la Constitution, selon la procédure d'amendement à être négociée. On peut s'attendre qu'à ce moment-là, chaque province aura ajusté sa législation de manière à ce qu'elle soit compatible avec la Charte, puisque les tribunaux devraient alors le mandat nécessaire pour déclarer inconstitutionnelle toute loi ou réglementation qui ne s'y conformerait pas.

**De quelle façon les droits nouveaux peuvent-ils affecter des lois provinciales déjà existantes qui ne seraient pas conformes aux nouvelles normes?**

Le Gouvernement est fortement d'avis que ce n'est qu'en vertu d'une modification à la Constitution que les Canadiens peuvent être assurés que certains droits linguistiques de base seront respectés dans tout le pays. Les accords réciproques ne sont pas à l'abri des changements sociaux et politiques à court terme ni d'une volte-face de la part d'une province ou d'une autre qui considérerait que l'engagement qu'elle a pris ne tient plus pour une raison ou pour une autre.

**préférable de laisser les provinces en traiter elles à la faveur d'ententes réciproques?**

française. Ces deux provinces font, d'ailleurs, des efforts pour progresser en ce sens. Il est bon de souligner aussi que la Charte donne le droit d'utiliser l'anglais ou le français à toute personne qui témoigne devant une cour du Canada sur des questions de nature criminelle relevant de la compétence du Parlement ou sur toute autre question de compétence provinciale qui pourrait conduire à l'emprisonnement.

**Qu'est-ce que la Charte prévoit en ce qui touche les droits linguistiques, notamment la langue d'enseignement?**

La Charte propose le droit pour tout citoyen dont la langue est celle de la minorité de langue officielle de choisir de faire instruire ses enfants dans cette langue, si le nombre d'enfants justifie la mise en place de ce qu'il faut pour offrir cet enseignement. Cette faculté de choix ne s'applique pas à ceux qui ne sont pas des citoyens canadiens ni aux citoyens appartenant à la majorité de langue officielle. Bien entendu, la Charte n'affecte aucunement le droit des parents de telle ou telle province de faire instruire leurs enfants dans la langue de la majorité. Il n'est pas question non plus d'interdire l'enseignement ou l'usage de la langue parlée par la majorité ou par la minorité ou de toute autre langue, ni de restreindre l'extension à tous les résidents des provinces du libre choix de la langue officielle d'enseigner ment pour leurs enfants.

**Qui va déterminer si le nombre d'enfants qui requièrent l'enseignement dans la langue de la minorité est suffisant pour justifier la mise sur pied des installations et programmes nécessaires à cet enseignement?**

La décision appartiendrait, en première instance, aux gouvernements provinciaux. Toutefois, si la rationalité de ces décisions devait être sérieusement mise en doute, on pourrait en appeler aux tribunaux.

**Pourquoi est-il nécessaire d'insérer cette question de la langue d'enseignement dans la Charte? Ne serait-il pas**

dans la région justifie un programme d'instruction dans cette langue.

**Quels «nouveaux» droits et libertés la Charte contient-elle?**

Plusieurs droits nouveaux et importants sont inclus, par exemple, à l'usage de l'anglais et du français au Canada. Quant à la traditionnelle liberté de religion, on a ajouté la liberté de conscience et de pensée; à la protection contre les fouilles et les confiscations déraisonnables, on a ajouté la protection contre les sanctions pénales rétroactives; on a ajouté le droit pour tout citoyen du Canada, de déménager d'une province à une autre, d'acquérir des biens et de gagner sa vie dans une autre province, et enfin, on a ajouté l'assurance expresse du droit de voter et de celui de postuler une charge électorale sans être assujéti à aucune discrimination.

**La Charte serait-elle mise en pratique sur-le-champ?**

Dès sa sanction par le Parlement, la Charte entrerait en vigueur pour ce qui est des questions relatives aux champs de compétence d'une province ne prendraient effet qu'après l'adoption de la Charte par cette province. Les gouvernements fédéral et provinciaux devraient alors, par une action conjointe, conserver la Charte dans la Constitution, c'est-à-dire, placer les garanties qu'elle renferme hors d'atteinte de toute modification unilatérale par un gouvernement.

**La section 133 de l'AANB permet de s'exprimer en anglais ou en français devant les cours du Québec. Le Québec serait-il obligé de continuer à autoriser l'usage de l'anglais devant la cour, et qu'advierait-il du français en Ontario et ailleurs?**

La nouvelle Charte propose que soient sauvegardés les droits historiques des communautés anglophones au Québec. Elle propose aussi que les mêmes droits devraient valoir pour le français devant les cours des deux autres provinces, l'Ontario et le Nouveau-Brunswick, où vivent des agglomérations appréciables de Canadiens d'expression



cinq ans au plus le laps de temps entre deux élections (sauf en cas d'urgence) et assure que le Parlement et les législatures siègent au moins une fois en douze mois.

## Droits linguistiques

Le projet de loi garantirait la protection des droits linguistiques. La Charte prévoit:

- le droit d'utiliser comme langues officielles au Canada l'anglais ou le français au Parlement et dans toutes les législatures, les lois, les archives, les compte-rendus et les procès-verbaux du Parlement fédéral, de l'Ontario, du Québec et du Nouveau-Brunswick étant publiés dans les deux langues;
- la protection, où qu'elles se trouvent au Canada, des collectivités francophones et anglophones identifiées contre l'affaiblissement de leurs droits traditionnels et de leurs coutumes;

- le droit pour tout individu de s'exprimer en anglais ou en français devant la Cour suprême ou devant toute autre cour fédérale et devant les cours de l'Ontario, du Québec et du Nouveau-Brunswick, ainsi que devant toute autre cour au Canada dont relèvent des points d'ordre criminel ou dans toute procédure pénale punissable par une peine d'emprisonnement ou le tribunal exerce la compétence que lui confère une loi provinciale;

- le droit pour le public de s'exprimer dans l'une ou l'autre des langues officielles lorsqu'il communique avec les quartiers-généraux ou avec les administrations centrales des ministères ou agences du gouvernement fédéral et, où le nombre le justifie, avec les principaux bureaux fédéraux et provinciaux partout au Canada; et,
- en ce qui concerne la langue d'enseignement, le droit pour tout citoyen dont la langue n'est pas la langue officielle de la majorité, dans quelque province que ce soit, de choisir de faire instruire ses enfants dans la langue officielle de la minorité, si le nombre d'enfants



Garantit des élections libres et démocratiques fondées sur le suffrage universel et la nondiscrimination, établit à

## Elections libres et démocratiques

Les droits et les libertés sont protégés contre toute discrimination raciale ou fondée sur la nationalité ou l'origine ethnique, sur la couleur, la religion, le sexe, la langue, l'âge.

## Mesures antidiscriminatoires

La Charte contient la liste des droits fondamentaux inhérents au statut du citoyen canadien: le droit de résider dans n'importe quelle province ou territoire du Canada, de déménager, sans entrave déraisonnable, d'une province canadienne à une autre et de bénéficier des avantages de la loi aussi bien que les autres citoyens résidant dans cette province, et ceci sans discrimination déraisonnable; le droit à la propriété et celui de gagner sa vie dans toute autre province que la sienne, à condition de se conformer aux lois généralement en vigueur dans cette province.

## Droits des citoyens canadiens au Canada

Mesure destinée à protéger contre des punitions ou des traitements inhumains.

**Protection contre les châtements cruels ou inusités**

Il assure l'innocence présumée, le procès équitable, le cautionnement raisonnable, la non rétroactivité des sentences, un degré de sévérité dans la punition qui n'ex-cède pas le degré prescrit au moment où le délit a été commis.

**Droit d'un particulier accusé d'une infraction**

Il assure, entre autres, le droit à un tribunal impartial, le droit de connaître l'argumentation de l'adversaire et celui d'interroger les témoins et de s'assurer une défense pleine et entière.

**Droit à une audition juste et impartiale**

prête quand ces poursuites se déroulent dans une langue que la personne ne comprend pas ou ne parle pas.

**Droit à la vie, à la liberté et à la sécurité**  
Assure une non ingérence de l'Etat dans ces domaines, sauf par l'application régulière de la loi.

**Droit de posséder des biens**  
Assure qu'il n'y a aucune dépossession de biens par l'Etat sauf selon des procédures prévues par la loi.

**Droit à la légalité et à l'égalité dans la protection qu'assure la loi**  
Assure une application sans discrimination des lois, et le droit à toute la protection que les lois peuvent fournir, notamment un procès équitable, les services d'un interprète, etc.

**Protection contre la détention, l'emprisonnement et l'exil arbitraires**  
Assure à tout individu, au Canada, qu'il ne peut être détenu par la police, emprisonné ou banni du pays sans justification légale.

**Droit d'être informé des motifs de son arrestation, droit de bénéficier des services d'un avocat, droit de contrôler la légalité de sa détention**  
Protège contre les mesures de renforcement de la loi susceptibles d'empiéter sur la liberté individuelle.

**Droit d'être protégé contre les saisies et perquisitions déraisonnables**  
Protège contre les fouilles policières et confiscations injustifiées.

**Droit de refus de témoigner sans garanties légales**  
Assure au témoin son droit de ne pas témoigner, à moins (1) qu'il ait pu s'assurer de la présence d'un conseiller juridique; (2) que tout témoignage utilisé dans un procès ne puisse servir dans une autre poursuite qui n'a aucun rapport avec le précédent; (3) que lui soient assurées les garanties constitutionnelles telles qu'un procès équitable et impartial.

**Droit aux services d'un interprète**  
Garantit à toute personne impliquée dans une poursuite officielle, son droit de recourir aux services d'un inter-

varient d'une province à l'autre et, sauf quelques rares exceptions, aucun n'est protégé par la Constitution. Ce qui a été promulgué hier par le Parlement ou par une assemblée législative provinciale, d'autres décrets peuvent demain le retirer ou en restreindre les effets.

La meilleure voie pour assurer aux Canadiens la jouissance des droits et libertés fondamentaux, où que ce soit au Canada, consiste à consacrer ceux-ci dans la Constitution où ils seront à l'abri de tout changement unilatéral de la part du Parlement ou d'un corps législatif provincial. La plupart des droits et libertés que renferme la nouvelle Charte s'inspirent de dispositions qu'on retrouve dans l'Acte de l'Amérique du Nord britannique ainsi que dans les lois fédérales et provinciales. Cependant, ils ont été étayés dans bon nombre de cas et d'autres ont été ajoutés.

## Droits et libertés publics et politiques

### Liberté de pensée et de conscience et liberté religieuse

Cette disposition prévoit, outre la liberté de religion, celle de n'en avoir aucune, et, en vertu de la «liberté de pensée», constitue une sauvegarde contre les tentatives d'endoctrinement forcé.

### Liberté d'opinion et liberté de parole

Cette reformulation de la traditionnelle «liberté de parole» n'implique pas seulement le droit de faire valoir ses propres points de vue, mais également celui de les maintenir, même si personne ne les partage.

### Liberté d'association et de réunion pacifique

Assure que le droit pour des personnes de se rassembler ou de s'associer à des fins pacifiques au Canada est indiscutable et qu'il revient à la Couronne de prouver qu'une assemblée a été tenue à d'autres fins qu'à des fins pacifiques.

### Liberté de la presse et des autres média de communication

Précise que les média de communication, tels que la radio et la télévision, jouissent comme les autres de la liberté de diffuser des nouvelles et des opinions.

De nos jours, au Canada, toute une gamme de lois fédérales et de statuts provinciaux garantissent certaines libertés et droits fondamentaux. Ces droits et libertés

... car, sans eux, l'homme perd la paix,  
la dignité et le pouvoir de s'exprimer qui  
sont les caractéristiques de l'être  
humain.\*

Philosophes et théoriciens de la politique ont maintenu de tout temps que le but premier de tout gouvernement, dans une société démocratique, doit être d'assurer les droits collectifs et individuels de cette société,

## Charte canadienne des droits et libertés

Oui. On y a fait valoir comme un but fondamental du principe de la nation canadienne l'engagement à éliminer les disparités inacceptables. On y trouve aussi l'engagement à poursuivre une justice sociale et les mêmes possibilités au plan économique pour tous les Canadiens. Il en va de même pour un «développement équilibré» du Canada. Plus particulièrement, l'énoncé fait état de l'engagement à «surmonter les inégalités inadmissibles qui existent entre eux [les Canadiens] dans chaque région», y compris les disparités dans les services publics mis à leur disposition.

**L'énoncé des objectifs mentionne-t-il quelque chose sur les disparités économiques entre les régions du Canada?**

L'énoncé des objectifs reconnaît pleinement les droits linguistiques des Canadiens d'expression française et garantit, dans ses principes de base, le respect de la langue française dans tout le Canada. Il reconnaît en outre de façon permanente, et à l'échelle nationale, le droit à la survivance et à l'épanouissement des Canadiens d'expression française.

**L'énoncé des objectifs de la Fédération canadienne tient-il compte des aspirations des Canadiens d'expression française?**

Le Gouvernement demandera au Parlement de sanctionner le préambule et les objectifs, mais pas avant que ce dernier ait eu toute latitude pour prendre connaissance des propositions, qu'aient été engagées des discussions avec les gouvernements provinciaux et que le public ait eu le temps de se faire entendre. L'adoption de ces textes en rendra les termes applicables au Parlement même, au Gouvernement du Canada et à toutes les institutions fédérales. Une fois adoptés par les provinces, le préambule et les objectifs seront intégrés à la Constitution de telle sorte qu'aucun gouvernement puisse y changer quoi que ce soit.

### **De quelle façon ce préambule et cet énoncé des objectifs seront-ils incorporés à la Constitution?**

Le Gouvernement estime que ces textes faciliteront l'examen en profondeur, en cours dans tout le pays, du concept de «citoyen canadien». Il espère que découlera de cet examen une formulation définitive des valeurs et des objectifs qui seront intégrés à la Constitution et qui inciteront les générations futures à partager le profond attachement qu'entretiennent les Canadiens pour leur pays en cette période de renouvellement. Le préambule et les objectifs serviront également à la formulation nette et précise des principes et objectifs qui sous-tendront la Constitution canadienne et qui devront guider les législateurs et les tribunaux.

### **Pourquoi le Gouvernement a-t-il proposé d'ajouter à la Constitution un préambule et un énoncé d'objectifs?**

*anglophone, . . . reconnaître que le pays a un engagement permanent à l'endroit du maintien et de l'épanouissement d'une francophonie canadienne concentrée mais non limitée au Québec, étant entendu que tous ces éléments se soutiennent mutuellement et renforcent les traits caractéristiques de la nationalité canadienne et l'originalité de son apport à la communauté mondiale.*



... garantir que la société qu'ils constituent soit régie par des institutions et des lois dont la légitimité émane de la volonté et du consentement du peuple, et que nulle intervention injustifiée ou arbitraire de la puissance publique ou d'une majorité quelconque ne porte atteinte à la liberté, à la sécurité et au bien-être des Canadiens;

... poursuivre en faveur de tous les Canadiens un idéal de justice sociale et d'égalité des chances économiques grâce à un partage équitable des bienfaits que leur procure et des charges que leur impose l'occupation de leur vaste pays, ce commun patrimoine dont ils sont les dépositaires dans leur intérêt propre et dans celui de leurs descendants, grâce aussi à leur engagement d'assurer le développement harmonieux de leur pays et la conservation de ses richesses et de sa beauté, ainsi que de surmonter les inégalités inadmissibles qui existent entre eux dans chaque région, notamment en matière de services publics élémentaires;

... élargir leurs horizons sur le plan individuel et, sur le plan collectif, ... mieux assurer leur sécurité et leur identité nationale, en les amenant à se pénétrer davantage jour après jour de l'idée que la fraternité et la diversité à la base de la nouvelle nationalité créée par leurs ancêtres ne sont nullement synonymes d'uniformité ni de division, et, à cet égard:

i) ... garantir dans tout le Canada un respect égal pour le français et l'anglais à titre de principales langues qui y sont parlées, ainsi que pour les Canadiens qui en font usage;

ii) ... garantir dans tout le Canada un respect égal pour les multiples origines, croyances et cultures comme pour les divers particularismes régionaux qui concourent à façonner la société canadienne, ainsi que pour les Canadiens qui en sont marqués;

iii) ... enfin, dans la mesure où la majorité nord-américaine est, et restera sans doute, massivement



*d'agir, et préparera la voie à la discussion approfondie que devront en faire le Parlement, les gouvernements provinciaux et le peuple canadien.*

## **Préambule et énoncé des objectifs**

La nouvelle Constitution devant traduire l'esprit et les aspirations qui animent les Canadiens, le Gouvernement en a formulé le préambule et les objectifs.

**Le préambule se lit comme suit:**

*Le Parlement du Canada, fort de la volonté manifestée par les Canadiens de vivre et de demeurer ensemble dans une fédération fondée sur l'égalité et le respect mutuel, composée de collectivités stables qui se distinguent par leurs origines et par leur passé respectifs et où tous puissent avoir davantage part à la plénitude d'une existence plus libre et plus riche;*

*rendant hommage aux apports des premiers habitants du pays, de ceux qui en ont jeté les fondations et de tous ceux dont les efforts en ont année après année enrichi le patrimoine;*

*et saluant dans la formation de ce patrimoine le rôle historique des collectivités francophone et anglophone au sein d'un Canada façonné par des hommes et par des femmes venus de multiples contrées;*

*est convaincu que le plein épanouissement des Canadiens d'aujourd'hui et de demain passe par un renouvellement de la fédération réalisé conformément aux objectifs fixés par la Constitution.*

**La finalité et les objectifs de la Fédération canadienne se lisent comme suit:**

*... protéger les droits fondamentaux de tous les Canadiens et ... favoriser les conditions de vie les plus compatibles avec leurs légitimes aspirations et avec leur valeur et leur dignité propres;*



- de modifier les articles constitutionnels qui touchent les institutions centrales de l'Etat, dont le Sénat et la Cour suprême;
- Parlement le pouvoir:
- La Constitution, dans sa version actuelle, donne au

## Première étape

Chacune de ces étapes prévoit que le Parlement, les gouvernements provinciaux et le grand public pourront étudier les propositions fédérales en profondeur et en discuter à fond.

Dans son document intitulé *Le temps d'agir*, le Gouvernement du Canada s'est engagé à s'efforcer de renouveler la Constitution en deux temps, la première étape devant être complétée avant le 1<sup>er</sup> juillet 1979, date de la fête du Canada, et la seconde, en 1981, année qui marquera le cinquantième de l'accession du Canada à l'indépendance formelle et à la souveraineté internationale par le Statut de Westminster.

## Mise en œuvre

- *Les symboles*, comprenant des dispositions prévoyant la reconnaissance constitutionnelle du drapeau et de la devise du Canada, ainsi que des hymnes national et royal.
- *Les organes du gouvernement central*, soit des propositions redéfinissant le rôle du gouverneur général, et, pour la première fois, définissant dans la Constitution les fonctions du Premier ministre et du Cabinet; et d'autres propositions intéressant les relations fédérales-provinciales, y compris l'institutionnalisation des conférences des premiers ministres;
- *La Cour suprême*, soit des propositions visant à modifier et à établir la Cour de telle sorte qu'elle soit partie intégrante de la Constitution, et à relever le rôle des provinces dans la nomination des juges de cette Cour;

formule complète d'amendement et sur le moyen de domicilier chez nous, au Canada, l'ultime autorité à laquelle l'Acte de l'Amérique du Nord britannique est assujéti. En octobre 1976, les provinces répondirent en formulant d'autres propositions et, en janvier 1977, le Gouvernement fédéral lui-même soumettait un ensemble de propositions supplémentaires. Pourtant, il était dès lors devenu évident qu'une révision plus fondamentale s'imposait. Le sentiment qu'ont de nombreux Québécois de ne pouvoir réaliser leurs aspirations au sein du Canada, l'impression d'isolement et d'aliénation de l'Ouest du Canada, l'inquiétude grandissante qui se manifeste dans toutes les régions du pays, les incertitudes qui aggravent sérieusement nos problèmes économiques, tout ceci est attribuable—au moins en partie—aux insuffisances de notre Constitution.

Le Gouvernement du Canada est d'avis que le projet de loi visant à modifier la Constitution donnera le coup d'envoi au renouvellement des structures politiques et du fonctionnement de la Fédération canadienne, et à un processus qui mènera à une constitution renouvelée et entièrement canadienne, pleinement adaptée aux besoins et aux aspirations des Canadiens.

## Principaux éléments

Ces éléments, qui sont exposés plus en détail ailleurs dans ce document, sont les suivants:

- *Le préambule et l'énoncé des objectifs*, qui proposent aux Canadiens une formulation des principes régissant notre existence nationale et l'ensemble de nos objectifs en tant que collectivité nationale;

- *La Charte des droits et des libertés*, y compris les droits linguistiques et les garanties des autres libertés et droits fondamentaux;

- *La Chambre de la Fédération*, une nouvelle chambre législative destinée à remplacer le Sénat et à assurer aux différentes régions et provinces du Canada une représentation mieux équilibrée à l'échelle nationale;

## Avant-propos

Le Gouvernement du Canada, conscient de sa responsabilité de promouvoir l'unité et le bien-être de notre Fédération et de toutes ses composantes, a mis de l'avant un projet de loi visant à modifier la Constitution. Le présent document a pour objet d'exposer en termes non juridiques les points saillants des propositions de ce projet de loi. Le lecteur désireux d'obtenir des explications plus détaillées est invité à consulter le projet de loi lui-même qui a été publié avec des notes explicatives pour chacune de ses clauses.\*

## Historique

Depuis que les Pères de la Fédération canadienne, il y a 111 ans, ont posé les assises du Canada, le contenu de l'accord dont ils sont convenus a évolué. La structure de l'accord, cependant, est demeurée essentiellement la même que ce que définissait l'Acte de l'Amérique du Nord britannique en 1867.

Cet acte est l'un des plus anciens pactes fédératifs au monde; il a survécu à cette époque de l'histoire où la naissance et l'édification d'états nouveaux ont causé le plus d'agitation. Pourtant, à mesure que le Canada s'acheminait vers son centenaire, il y a de cela plus de dix ans, il devenait évident qu'une révision de nos accords constitutionnels fondamentaux s'imposait. La mise sur pied de la Conférence constitutionnelle, en 1968, et les entretiens qui se poursuivirent ensuite avec les provinces pendant trois ans conduisirent à une tentative d'accord sur un nombre limité de modifications, à Victoria (Colombie-Britannique), en juin 1971. Pour diverses raisons, cette tentative fut infructueuse.

En 1975, le Premier ministre proposa aux premiers ministres des provinces d'essayer de s'entendre sur une

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# Projet de loi sur la réforme constitutionnelle, 1978

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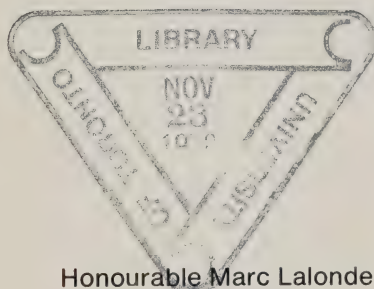
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# Constitutional Reform

## House of the Federation



Honourable Marc Lalonde  
Minister of State for  
Federal-Provincial Relations



Government  
of Canada

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du Canada



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# Introduction

On June 20, 1978 the government tabled in the House of Commons the Constitutional Amendment Bill. The Bill includes proposals for a new House of the Federation to replace the present Senate. While a number of important sections of the British North America Act may be amended only by the Parliament of the United Kingdom, Canada's Parliament has the authority, since a 1949 amendment to the B.N.A. Act initiated by the then Prime Minister, the Right Honourable Louis St-Laurent, to amend on its own certain sections of Canada's Constitution. These sections include the ones dealing with Parliament's second chamber, the Senate.

Since June 20 the proposals for the new House have been variously described as audacious, of no consequence, the centrepiece of the Bill, mere tinkering, dangerous, well-balanced, unworkable, ingenious, and so on. Evidently, there is a wide difference of opinion about whether the Senate should be abolished, what kind of second chamber (if any) should be put in its place, and how the new House of the Federation proposed by the government would be likely to function in practice.

This paper attempts to set forth the government's thinking about the question of replacing the Senate: why the government believes that a new second chamber is needed which will be significantly different from the present Senate; why direct election of members could create difficulties for our parliamentary system; why appointments by governments

would not yield as good results as selection by legislatures of members representing all political parties, and why the provincial as well as the federal legislatures should participate in selection. It deals with other questions involved with the new proposals, including why there should be a special voting procedure to protect the position of the French language in Canada and how the proposed new House of the Federation would be likely to affect the legislative process.

In explaining why the government made the choices that it did among the various possible alternatives, and in attempting to forecast the effect that the new House would have, the paper tries to take into account some of the questions which have been raised since the proposals were made public. The government recognizes that there are no perfect solutions to the problem of restructuring the institutions of government. Any solution will represent a compromise among several sometimes competing objectives.

The solutions that the government is proposing are the best that it has been able to devise. They are presented for discussion, and comments are not only needed but welcomed. It is hoped that this paper will contribute to discussion of the issues, and to furthering the process whereby we may finally arrive at a wise choice of new constitutional arrangements as part of the renewal of Canada's federal system.



## Why Replace The Senate?

The government believes that it is necessary to replace the Senate because the country and Parliament need a second chamber that will function as a politically effective regional forum; that is, a forum in which different and competing regionally-based interests can be freely expressed, argued, and, if possible, reconciled by persons who are recognized by the public to be representative of their region.

Why does the present Senate not fill this role? Why is such a forum needed now? Could the House of Commons fill the need better than a new second chamber? In attempting to answer these questions it will be useful to look first at the arguments for a "bicameral" legislature and then at the evolution of the Senate since 1867.

### The arguments for a "bicameral" legislature

The central institutions of a federation typically include a "bicameral" legislature: that is, one composed of two chambers. One of the two chambers is elected on a "rep by pop" basis (proportional to population), but the other is usually one in which the component units or regions are represented equally or nearly so. Such a bicameral legislature has, ever since the U.S. confederacy became a federation in 1789, been a device, when a federation is established, for reassuring the less populous units that they would not be completely subject to decisions taken by the majority of the population. Thus reassured, they could acquiesce in sufficient powers being given to the central authorities to achieve common purposes.

A further reason for having an "upper house," both in federations and in unitary countries, has been to provide for "sober second thought" to be given to legislation emanating from the "lower house." The usual practice has been to select the members of the upper house in a more "conservative" way than members of the popularly-elected lower house, in order to provide a greater element of

stability, and, some thought, wisdom, than might be found in an assembly elected solely by purely democratic means. The unfettered will of the majority was, and often still is, mistrusted, therefore, not only by the less populous units of a federation but by those who fear demagogues, charismatic leaders, and indeed just the pressures which may be brought on the government of the day to act in a hasty, ill-considered and unwise fashion.

The manner of selecting the members of the house of "sober second thought" has varied a great deal. There have, for example, been qualifications of heredity and lineage (as in Britain), of property, and of age. Persons have been appointed by the Crown, by the President, or by the government. Or they have been elected by a much smaller group than the population at large, for example, by the members of a legislature. Frequently, members of the upper house are given a longer term of office than members of the lower house, in order to give them greater independence and to provide stability. Occasionally, several such provisions are brought together. In the United States, for example, Senators used to be "indirectly" elected, that is, elected by the state legislatures; the minimum age for Senators was and still is higher than for members of the House of Representatives, and Senators had and still have a longer term of office than members of the lower house.

### The establishment and evolution of the Canadian Senate

The two main arguments for a bicameral legislature in a federation were accepted at the time of Confederation: that is, that the less populous units should be given protection, and that the legislation of the popularly elected lower house, the House of Commons, should be subject to "sober second thought." A second chamber, the Senate, was therefore established. Protection for the less populous units was to be achieved by distributing the seats in the Senate on the basis of "Senate regions" and

"sober second thought" was to be achieved by having Senators appointed by the Governor General in Council, for life. (The first group of Senators was, however, to be drawn wherever possible from among the members of the Legislative Councils in each province. The nominations were made by the provincial governments, and they were to ensure that both political parties were fairly represented.)

In 1867 there were three Senate regions (Ontario, Quebec and the Maritimes), and in 1915, at the time of the last main distribution of Senate seats, there were four regions, the West being the new region. Each region had 24 seats. However, since 1949 the Atlantic region has had 30 seats, six more than the others, because of the seats given to Newfoundland when it became a part of Canada. One seat has been added for each of the Territories.

At the time of Confederation, the debates about the composition of the Canadian Senate were extensive and a key element in the founding of our present federal system. For example, the fact that Quebec would receive as many Senate seats as the more populous Ontario made Quebec's acceptance of the federal arrangements, which included a "rep by pop" Commons, easier.

The Confederation debates about the Senate were vigorous because the Senate was expected to be a politically powerful institution. In fact, the Senate has not over the years proved as important as the Fathers of Confederation anticipated. Undoubtedly a major factor has been that Senators were appointed by the government of the day, mainly from among supporters of the government party. A further factor has been the evolution since the 19th century of popular attitudes regarding appointed versus elected representatives. As a result, the Senate has become very much overshadowed by the directly-elected House of Commons.

The Senate has played a most useful role as a house of "sober second thought": it has improved

the quality of legislation by careful vetting of draft legal texts, and its committees have done valuable investigative work. But its members are not recognized by the public to be strong advocates of regional interests, and their influence as regional representatives on what might be called the policy content of federal legislation has been relatively small. The Senate has therefore been more successful as a house of "sober second thought" than as a regional forum. In most countries, whether federal or unitary, there has been a trend towards discounting the importance of the "second thought" role, while in federations the regional forum role is on the whole just as important as it ever was. In Canada the need for an effective regional forum may even be said to be a pressing one.

### **Other forums for the reconciliation of regional differences**

Regional interests are of course espoused and reconciled within the Cabinet and within the parliamentary caucuses of the House of Commons, but for reasons of Cabinet and caucus solidarity this process takes place behind closed doors.

So far as their public utterances are concerned, Members of Parliament will usually subordinate advocacy of regional interests to their primary responsibility of supporting or opposing the government of the day. With neither the Senate nor the Commons filling an unfettered role as a regional forum, the public debate and reconciliation of regional differences regarding national policies is being increasingly taken over by federal-provincial negotiations or so-called "executive federalism."

Executive federalism does, however, have a number of drawbacks. Executives are strengthened in relation to legislatures, at a time when the reverse may be required. Conferences often take place in private and they often fail to produce a consensus or even a clearly articulated result. This leaves an impression of continual discord between govern-



ments which can exaggerate the degree of division within the country. The federal institutions of government, because they do not contain an effective regional forum, lose political authority. The result has tended to reinforce some of the centrifugal tendencies which have always been present in the Canadian Federation and which weaken our sense of unity.

It has been suggested by some that one could, by making changes in the way the House of Commons operates, turn it into a forum in which regional views are more freely expressed and thereby perhaps do away with the need for a second chamber. For example, it has been suggested that party discipline could be relaxed in two ways, thus allowing MPs more easily to argue publicly on behalf of the interests of their particular region or province. One way would be to allow more "free votes," that is, votes that are not subject to the party whips. A second way would be to provide that a loss of confidence in the government could be registered only by a specific vote to that effect, which would allow MPs of the government party on occasion to vote against the government on a measure which they thought was injurious to their region. It has also been suggested that the "first past the post" electoral system could be changed to remedy some of its negative effects on provincial representation in the House of Commons. One of these effects is that political parties may win in the various provinces a share of seats that is much different from their share of the popular vote, with the result that parties become identified in the public mind with certain provinces or regions more than is really warranted, and this can be a handicap to the government of the day. For example, the present distribution of seats understates Liberal support in the West and Progressive Conservative support in Quebec. It sometimes happens, as the result of the electoral system, that the government party may fail to elect a single MP from a given province, which ordinarily means that the province will be unrepresented in the Cabinet.

The government has considered these suggestions, and it agrees that to implement them could

have some beneficial results, although some unacceptable problems may be created too. For example, a change in our electoral system to one of proportional representation would change greatly the operation of our party system and parliamentary system of government. It could result in a multiplicity of parties and continual coalition governments.

The main difficulty, however, is that it seems doubtful whether such change would achieve the objective of an effective regional forum. For example, there is probably very limited scope in our system of government for having free votes on major policy questions that affect the regions. Most federal legislation does have different regional effects, so that to except all or much of such legislation from partisan politics would be to take away a good deal of the need for party organization and activity. Secondly, while a new electoral system would change the representation in the Commons it would not of itself remove the need for party discipline, and one possible result is that one might end up with a multiplicity of parties each representing a different province or region, so that one would lose the integrating role which is now carried out by the major federal parties which have support across the country. While this result would be tolerable in a second chamber to which the government was not responsible, it would scarcely be tolerable in the House of Commons.

Other federations have invariably found it necessary to have a second chamber, and this does seem to be the advisable course for Canada too. The problem is to devise a second chamber that will be not only politically effective as a regional forum but also compatible with our parliamentary system of government. In other words, a new second chamber should have sufficient political authority to represent regional interests effectively, but it should not undermine the ultimate supremacy of the House of Commons, because otherwise our system of having a government answerable to one directly-elected chamber would become unworkable. The succeeding sections of this paper will assess the various alternatives with these criteria in mind.





## What Are The Alternatives?

There are three principal choices to be made regarding the creation of a new regional forum:

- How members should be chosen.
- What powers the new House should have.
- How seats would be distributed among Canada's provinces.

### How should members be chosen?

Perhaps the key issue is how members should be chosen, because the method used will determine to a large extent the political authority they can command and the power which they can effectively exercise. The present Senate has legislative power which, except as regards money bills, is equivalent to that of the House of Commons, but Senators feel that they can exercise it to the full only on rare occasions. There are several alternatives to the present system of appointment, and the principal ones are as follows:

#### A first alternative:

Senators appointed for an indefinite period (until retirement) by the federal government from among persons nominated by provincial governments. (The Special Joint Parliamentary Committee on the Constitution recommended in 1972 that half of the Senate be appointed in this way.)

#### A second alternative:

Senators appointed for fixed terms by the federal and provincial governments.

#### A third alternative:

A Senate composed of provincial government ministers, similar to the German "Bundesrat" where a province's votes are cast in a block by each provincial government (see Appendix 1).

#### A fourth alternative:

Senators elected directly by popular vote, as in the United States, Switzerland and Australia (see Appendix 2).

#### A fifth alternative:

Senators elected by federal or provincial legislatures, or by both. (This is known as "indirect election.")

### **First alternative: Senators appointed by the federal government for life from among persons nominated by the provincial governments.**

In the view of the Government of Canada this would not be likely to bring about a significant change in the role of the second chamber. It is true that there could be some improvement of regional representation, in that the parties in the Senate would become more varied, although probably not as varied as under a system of selection by provincial legislatures (see the fifth alternative described below). The main difficulty would be that Senators appointed for life (at least, until retirement) would not feel able to play a politically effective regional role. This point will be expanded upon later.

### **Second alternative: Senators appointed for fixed terms by the federal and provincial governments.**

While this would involve more of a change from the present system, because appointments would be for a limited period, one would not necessarily succeed in having members in the second chamber who would be seen as truly representative of their region. For example, when there is a change of government, the Senators appointed by the former government would be open to the charge of being no longer representative. A further difficulty is that, while there would be representatives from more than one feder-

al or provincial party, as governments change, it would be difficult to achieve a broad mix of regional representatives drawn from minor as well as major parties.

### **Third alternative: a "Bundesrat"**

This would involve a major change from the present system, and because it has been the subject of considerable interest in some quarters, it merits an extended discussion here. A Bundesrat is a second chamber composed of provincial ministers voting on the instructions of their government, not just nominees or appointees of provincial governments as under the first and second alternatives mentioned above.

The idea of a Bundesrat type of regional forum appeals to some, because the institution has undoubtedly been successful in Germany, and it is argued that a comparable body in Canada would result in better coordination of federal and provincial government activities and in a greater integration of federal and provincial politics. It must be noted, however, that there are several reasons why the institution is particularly suited to the German federal system and why it might not work as well in Canada.

Germany has a distinctive type of federal system in which most legislative power is concentrated at the centre, with a resulting high degree of uniformity in public programs throughout the country, and much of the central legislation is administered not by the central government but by the provinces. A high degree of institutionalized coordination is therefore essential, because in broad terms it may be said that the specialty of the central authorities is legislation and the specialty of the provincial authorities is administration. This "division of labour" is, therefore, a principal justification for the existence of the Bundesrat.

Moreover, there are two features of the German federal system which, compared with the Canadian

system, may make it easier for a Bundesrat to work well, in a spirit of compromise and give-and-take. The first is the absence in Germany of some factors in Canada which tend to place a strain on inter-regional relationships. Thus, the divisions that we have in Canada between centre and periphery (e.g., about tariffs and freight rates), between poor and rich provinces, between resource-rich provinces and those less well endowed, and between linguistic groups, do not exist in comparable degree in Germany.

The second feature of the German system is the greater degree of integration of the federal and provincial political parties. Most of the great political issues in Germany are party political issues rather than interregional or federal-provincial issues. The two latter types of issue tend for the most part to be resolved first within the political parties, and then between them. The result is a regionally more cohesive system, since the debate about the issues takes place with a national focus centred on national institutions, notably on the lower house of the federal legislature, but also more recently on the Bundesrat as well because it has lately become increasingly involved in the national struggle for party supremacy.

It is argued by some Canadians that the creation of a Canadian equivalent to the Bundesrat would help to bring about integration of the federal and provincial political parties and make provincial governments politically "responsible" for the positions they take with regard to federal legislation and policies. While this could in fact happen to some degree, it is unlikely that it would come close to reproducing the situation in Germany, first because of the differences already mentioned between Canadian regions and linguistic groups, and second because there is little prospect of the provincial governments in Canada agreeing to the same kind of "division of labour" (legislation at the centre, and administration by the provinces) that is practised in Germany. If the provinces were to retain their present wide range of legislative authority, which is wider than in any other

of the well-known federations except perhaps Australia, a solid basis for separate provincial parties would remain. (Even in Germany Bavaria has a separate political party.) In a Canadian Bundesrat they would confront one another on the basis of widely-divergent interests, wider than in Germany.

It must also be noted that in Germany there are some important criticisms of the Bundesrat. It is argued that German provincial legislatures as distinct from provincial governments have little influence on federal legislation, even indirectly, and that executives generally have too much power. It has also been argued that all parties represented in a province's legislature should be represented in the province's block of votes in the Bundesrat, rather than just the government party or coalition. It should also be noted that for most of the period since the present German Constitution came into effect, the Bundesrat has been controlled by the same political party or coalition as the lower house. In the last few years the Bundesrat has been controlled, at first by a narrow margin but now by one which is increasing, by the parties in opposition to the government, and the effects of this being carried on into the long term are not easy to assess. It is also a feature of the system that an election in a single province can change the party configuration in the Bundesrat and with it, the chances of the government implementing its political program because the Bundesrat has an outright veto over perhaps more than half of all federal legislation, and the second chamber more often than not votes on party lines.

On balance, it appears that for Canada to adopt a Bundesrat type of second chamber would represent a major institutional change comparable in degree with changing from a parliamentary system to a congressional one, and that given Canada's particular characteristics it is by no means clear that such a change would be desirable or even workable.

It may be added that while a Bundesrat could introduce closer federal-provincial coordination (albeit somewhat one-sided, because only federal

legislation would be subject to it), this is not the primary goal of the government in seeking to establish an effective regional forum. The government believes that effective coordination of federal and provincial policies and programs will continue to be largely the domain of intergovernmental consultation and conferences.

#### **Fourth alternative: direct election**

An obvious alternative to consider is direct election of members of the second chamber. This is the method used in two congressional type systems based on the separation of executive and legislative powers (the United States and Switzerland) and in one parliamentary system very similar to our own (Australia). The U.S. and Swiss upper houses each in their own way constitute an effective regional forum as part of the central institutions of government. They encourage a high level of national integration. For example, federalism in Switzerland is as much a question of the representation of the cantons in the Swiss Senate as it is of the degree of legislative autonomy which is given to the cantons. However, it is evident that it is easier to achieve a successful regional forum in congressional systems, and ones in which elections take place at fixed intervals: Senators may speak out and vote in a relatively independent fashion without fear that they are likely to undermine the position or bring about the fall of the government.

What is perhaps more instructive for Canadians is the Australian experience, because Australia like Canada has a parliamentary system, and the fact is that that experience has on the whole been disappointing. The directly-elected Australian Senate has, by and large, tended to become not so much a forum for the articulation and reconciliation of regionally-based interests as an extension of the party-based conflict in the lower house. Thus, in the Australian Senate party discipline tends as in the lower house to mute the expression of regional interests. When the Senate helped to force the election



that brought about the fall of the Whitlam Government in 1975, one result was an intensification of the controversy that has for a long time in Australia surrounded the role of the Senate.

It is perhaps possible by making some changes in the Australian model to adapt it for Canadian use. Thus, one could give a Canadian second chamber somewhat less power. One could also try to arrange matters so that a directly-elected second chamber would be less dominated by the struggle between the federal parties; this might be achieved by having members elected on the occasion of the provincial general elections in their province, so as to involve the provincial parties as much or more than the federal parties. However, no matter what precautions are taken, any form of directly-elected Senate is bound to raise questions about whether the government should command the confidence of not only one but both houses, and therefore about its capacity to act effectively. The experiment might work but it might not, because there would be a number of uncertainties. The risks would be much greater of paralyzing the system than under the less radical change which would be involved in the remaining alternative: the alternative of so-called "indirect" election.

### **Fifth alternative: indirect election**

Members of the second chamber could be elected "indirectly," that is, by a two-tiered system of elections: the voters first elect legislators, whether federal MPs or provincial MLAs, who in turn elect members of the second chamber. Indirect election was used for the United States Senate until 1913; until that time the state legislatures elected federal Senators. In Switzerland, the method of choosing a canton's representatives in the second chamber depends on cantonal law, and until quite recently a few cantonal legislatures elected their representatives by this "indirect" method. Now all Swiss cantons use direct election. Both the U.S. and Swiss political systems are, as noted already, based on the

separation of powers between the executive and the legislature, and in those countries the replacement of indirect election with direct election could be undertaken with fewer worries than in a parliamentary system. In India, which has a post-World War II constitution and a parliamentary system, indirect election by state legislatures is used for the federal second chamber, with the exception of a few members chosen by the President of India.

One criticism of indirect election is that it is less democratic than direct election. The advantage for a parliamentary system, on the other hand, is that members of an upper house who are elected indirectly are less likely to feel that they have an electoral mandate that is strong enough for them to challenge repeatedly and in a partisan way the directly-elected members of the lower house.

The principal questions which arise in the case of a system of indirect election are as follows:

- Should the federal legislature or the provincial legislatures, or both, elect members to the second chamber?
- Should the elected members be chosen by majority vote in the legislature (and so perhaps be likely to come mainly from the government party)? Or should they be chosen to reflect the proportion of seats held by each party in the legislature? Or should they be chosen to reflect the proportion of the popular vote won by each party represented in the legislature?

On the first question, there are those who would argue that, failing direct election by the voters in a province, the institution which represents only the province, that is, the provincial legislature, should elect its representatives. This would correspond with past practice in the United States and Switzerland and with present practice in India. Against this view it might be argued that the provincial legislature is elected solely to pass laws in areas of provincial jurisdiction; that the voters in provincial elections

should not be asked to take into account an added complex dimension, namely, how MLAs may proceed to choose members of the federal second chamber.

A further argument is that there is no good reason for a "check" by the indirectly-elected representatives of provincial legislatures on the exercise of federal jurisdiction by directly-elected MPs (except possibly in relation to use of the federal spending power in areas of provincial jurisdiction). Consequently if members of the second federal chamber are to be indirectly elected they should be elected by the House of Commons which, no less than provincial legislatures, contains members who represent local and regional constituencies and interests, but who were elected to discharge a role in relation to federal affairs.

Evidently, there are arguments on both sides. The question is perhaps best resolved by recognizing that federal and provincial legislators both represent regional interests, although from different perspectives. It follows that the federal and provincial legislatures and political parties should all play a role in the selection of members of the second chamber.

The second question was how the various political parties which are represented in the federal and provincial legislatures should be represented in the second chamber. If only the government parties are represented, and if, say, half of the members of the second chamber are from the party of the federal government of the day, that government could well be in a position to control the new House at all times thus reducing the likelihood of achieving a forum in which regional views may be freely expressed. If, despite the arguments in the preceding paragraph, one were to exclude members elected by the House of Commons and confine the membership to persons representing the provincial government parties, one would have something that closely approached a Bundesrat, except that the members would not be provincial ministers. Enough has been said already in this paper to suggest that a Bundesrat type of

second chamber is probably not suitable for Canada.

If the term office of such members ended with each provincial election similarity to a Bundesrat would be very close. The term of office could, however, be fixed and of such a length that it would exceed the life of a provincial government, thus giving the members somewhat more independence. The problem then would be that when a government changes hands during this fixed term, the new government would no longer regard the province's members in the second chamber as being properly representative.

One further difficulty with only the government parties being represented in the second chamber is that, under our "first past the post" electoral system, a government may have a majority of seats in the legislature but represent only a minority of the electorate. While the electoral system may help to increase the likelihood of governments having a majority of seats in the legislature, and this is seen by some as being helpful to our system of parliamentary government, a fairly strong argument could be made against using the disparate results of the electoral system as the basis for a further, "indirect" election of persons to serve in the second chamber.

It is evident that there are difficulties with confining the representation to government parties only. The advantages of extending the representation to opposition parties are equally evident. With more parties represented in the second chamber, the chances of the federal government of the day or the official opposition controlling it are likely to be small, so that party discipline should play a minor role and, as a result, regional viewpoints could be more freely expressed. With all opposition as well as government parties represented, the debates would probably be more vigorous, and the confrontation of differing views and their reconciliation would probably be a more open process. For example, if only provincial government parties were represented, it is quite conceivable that more agreements and accom-



modations would be made out of the public eye, rather than on the floor of the new House, much as they are now made among governments at and in between many federal-provincial conferences.

A further advantage of having more parties represented is that interregional "cleavages" or hostility could be softened by the formation, with regard to different specific issues, of different inter-party alliances which cross regional boundaries. The House of Commons already performs such an integrating function but, as has been noted, within the constraints of a measure of party discipline which has to be severe enough to carry on parliamentary government.

If it is considered that the members chosen for the second chamber should be drawn from more than just the party which forms the government in the legislature, one must provide either by convention or by a written rule the way in which members would be drawn from other parties as well. It has already been suggested that the disparate results of our "first past the post" electoral system should not be used as the basis for a further, "indirect" election. One should therefore not use as the basis for distributing seats in the second chamber the number of seats held by each party in the legislature, but rather the share of the popular vote which each party received at the most recent general election.

## What Choice Should Be Made Among These Alternatives?

The first question for decision is the method of choosing members of the second chamber, because the method will in large measure determine what legislative power ought to be given the chamber and, as a result, the political authority which it can exercise. When one has an idea of the power and authority that will be conferred it is easier to address the important question of the regional distribution of seats.

Of the five ways of choosing members, it appears that the ones which ought to be carefully examined are the Bundesrat system, direct election, and indirect election. No attempt has been made to look at hybrid forms, because there would be serious difficulties both for the chamber and for handling the selection process in any system that did not have all or the vast majority of members chosen on the same basis. For example, with a mixture of directly-elected and appointed members invidious comparisons would probably be made between the "mandate" of each class of member.

### Criteria for a new second chamber

The government has expressed a preference in the Constitutional Amendment Bill for the fifth alternative, the method of indirect election, because it believes that this method comes nearest to meeting all of the following criteria which it considers are necessary for a new second chamber.

1. The second chamber should constitute a forum in which regional views may freely be expressed.

Members should not be bound by the constraints of party discipline that apply in the House of Commons. This relative freedom from party discipline (it would only be relative and not absolute) could exist only if the government did not, either in law or in terms of practical politics, have to command the confidence of the second chamber in order to survive. The Constitution could

state explicitly that the government is not formally obliged to command the second chamber's confidence, and the second chamber's powers of veto could be appropriately limited; but despite these constitutional provisions one could envisage a situation in which a second chamber could repeatedly frustrate the government's attempts to legislate. The best way to ensure against this would be to so arrange matters that no single federal political party can at any time expect to have a majority of members, or to control a permanent majority in concert with other parties. Consequently, the new House should be so designed that party groups would be comparatively numerous and would tend to combine in different ways on different issues: alliances would be continually shifting. As a result, the government of the day in the House of Commons should be able to expect neither to control the new House, nor to face an unchanging hostile majority that is dedicated mainly to frustrating its political program.

2. The regional views expressed in the second chamber should reflect the broadest possible mix of representative groups.

This means in practice that all of the political parties, whether federal or provincial, which enjoy significant support in a region should be represented, and therefore both the federal and provincial legislatures should select members of the second chamber.

3. The House of Commons should remain supreme, so that the principle of responsible parliamentary government will be preserved.

While the Commons, through the government of the day which is responsible to it, should be obliged to negotiate

and compromise with party groups represented in the second chamber, it should ultimately be able to make its will prevail on a given issue, although at some political cost if it does so without adequate justification in the eyes of the electorate.

### **Applying the criteria to alternative ways of choosing members**

It has been argued here that a system of direct election might not meet the third criterion; nor might it meet the first, because a directly-elected body could, as appears to be the case with the Australian Senate, be dominated by a struggle of the federal parties to control it. This could happen even if the provincial parties were involved through the holding of elections for the second chamber coincident with provincial general elections. Thus, direct election would run the risk of failing to achieve the principal objective of a forum in which regional views may be freely expressed.

A Bundesrat type of second chamber would fail to meet the second criterion, which calls for a broad mix of regional groups to be represented. If one is establishing a forum to represent regional views it would seem that political parties other than the party of the government of the province should be represented as well. This is particularly desirable in Canada because, as the result of the "first past the post" electoral system which prevails in Canada, and which applies to elections in all of Canada's ten provinces, a government may represent only a minority of the electorate. A Bundesrat would not only fail to provide a broad mix of regional representatives, it would also threaten Commons supremacy unless its powers were appreciably less than those of the Bundesrat in Germany.

A system of indirect election can more easily be designed so as to meet all of the three criteria listed earlier. If the political parties to be represented in

the new chamber were sufficiently numerous and broadly representative, no one party or permanent grouping of parties would be likely to dominate the chamber, and it should therefore be possible to achieve in the chamber a degree of freedom for expression of regional views, based on a judicious balance of regional and party loyalty, that cannot be achieved in the House of Commons. Also, because members would be indirectly elected, it is unlikely that they would seek as a collectivity persistently to frustrate the will of the directly-elected Commons. It is these considerations which have guided the government in setting forth in the Constitutional Amendment Bill the particular features that it believes should characterize the new chamber. Before giving a resumé of those features, it would be well to say something about two important matters: the distribution of seats among the provinces, and the proposed "double majority" voting mechanism for approving measures of special linguistic significance.

### **The distribution of seats among the provinces**

It was noted at the beginning of this paper that the salient feature of a second chamber in a federal system is that, in order to ensure that all regions have an adequate input into the central legislative process, it overrepresents the less populous component units of the federation in relation to their share of population. In the present Canadian Senate, the distribution of seats among the provinces and regions has been of relatively limited importance, given the lack of political authority now exercised in that body. In the new second chamber in which the members would want, and would be expected, to exercise a greater degree of political authority, the question of the distribution of seats takes on added significance.

One of the principal and most persistent characteristics of the Canadian Federation is the tension between the "outer" provinces of the Atlantic and

Western regions on the one hand, and the "inner" provinces of Ontario and Quebec on the other. It affects public discussion on numerous important policy issues, such as tariffs, freight rates, and industrial development. In the broad sweep of Canadian history it stands comparison with the tension between Canada's linguistic groups. As Premier Blakeney of Saskatchewan has recently said, for the western grain farmer the "enemy" is Bay Street and St. James Street, rather than the francophone living in Quebec. In the terminology of Premier Lévesque, the eastern, western and central scorpions have managed not only to survive but to flourish remarkably well together in the same Canadian bottle. However, the tensions between the regions have lately increased, and power has shifted, to the point that Canada's central institutions of government should take account of these new developments. One may indeed speculate that, if the Senate had worked out in the way that was originally expected, this tension would have been more successfully accommodated.

Be that as it may, it is the belief of the Canadian government that the distribution of seats in a new second chamber should, while retaining the historic parity between Ontario and Quebec, give a larger share to the West. Within the Atlantic region additional seats should be given to Newfoundland to reflect a better balance within that region in relation to the population of the four provinces composing it.

### **The "double majority" mechanism for linguistic measures**

The second matter mentioned above is the protection of the position of the French language in Canada. French-speaking Canadians fear that they may become a progressively smaller minority in Canada, and in North America as a whole, and that the survival of their language and culture is therefore seriously threatened. The government has inserted in the Constitutional Amendment Bill, as part of the

proposed Statement of Aims of the Canadian Federation, "a permanent national commitment to the endurance and self-fulfillment of the Canadian French-speaking society centred in but not limited to Quebec." Several provisions of the proposed Charter of Rights and Freedoms would help to ensure the realization of this goal, but such provisions could not alone ensure that the position of the French language would be fully protected against action that could be injurious even though it were not in breach of any of the provisions.

As has already been noted in this paper, the purpose of a federal second chamber is to protect the regional interests of the less populous provinces in the day to day consideration of federal legislation, by giving them a voting strength which is more than proportionate to their population. The same considerations argue that the second chamber should be used to protect the special interests of a minority linguistic community by according to it, for certain legislation, a voting strength which is more than proportionate to its share of population. The protection of Canada's minority official language and the protection of the interests of the less populous provinces and regions are, in the view of the government, equally vital for the well-being of the Canadian Federation. The government has therefore included in the Bill the requirement that measures of special linguistic significance should be approved by a "double majority" in the new House; that is, a majority of its French-speaking members as well as a majority of its English-speaking members.

It should be noted that while a good many and perhaps most of the French-speaking members will be from the Province of Quebec (as will some of the English-speaking members), a number will also be from other provinces. This proposed voting mechanism is therefore not one that would give a "special status" to the representatives of the Province of Quebec. It would help to protect the language of the French-speaking Canadians from all provinces.





## What Is Proposed In The Constitutional Amendment Bill?

What follows are the principal proposals regarding the new second chamber that are contained in the Bill.

1. The present Senate would be abolished. (While there are no provisions in the Bill itself to compensate present Senators for their loss of tenure, the Prime Minister has stated that a special commission would be established to review this question and to make recommendations.)
2. A new House of the Federation would be established, composed of 118 seats. The distribution of these seats would be based partly on the four traditional Senate regions, and partly on the principle that the less populous is a province, the more should its share of seats be weighted. While the number of seats for Ontario and Quebec would remain at 24 each, the number for the Atlantic region would be increased by two for a total of 32 (these two additional seats going to Newfoundland), and for the Western region by 12, for a total of 36 (British Columbia and Alberta would get four more each, and Saskatchewan and Manitoba would get two more each). The two Territories would get one seat each, as now. Both the present and the proposed distribution of seats are shown in the attached table (Appendix 3).
3. Half of the members of the new House that are to be chosen from any particular province would be chosen by the House of Commons, following a federal general election, and half by the provincial legislature, following the general election in the province. In both cases, the allocation of seats would be made, so far as is practicable, in proportion to the popular vote received in the province by those political parties contesting the election in question and electing at least one member to the legislature. Members from the Territories would be selected by the Governor General in Council after each election of the territorial councils. The attached tables (Appendix 4)

show how the seats would be allocated among the various political parties at this time (August, 1978) if the proposals in the Bill were already in effect. The allocation has been worked out using the results of the most recent federal and provincial general elections. With each new election, the standings would of course be likely to change.

4. In keeping with long-standing Canadian parliamentary tradition, members of the new House could not also be members of Parliament or of provincial legislatures.
5. The government of the day would not have to command the "confidence" of the new House in order to survive.
6. The new House would have only a "suspensive" veto: that is, after not less than 60 days had elapsed following a negative vote in the new House on a Bill that had been passed by the Commons, the government would, despite the negative vote, have the option of presenting the Bill for the assent of the Governor General, whereupon the Bill would become law. Similarly, if the new House neglects to deal with a Bill, the government may, not less than 60 days after the Bill was presented to the new House, present it for assent. In both cases there is, after the minimum delay of 60 days, a limited period within which the government must exercise this option.
7. It is apparent that there could be an interval as long as 120 days between the passing of a Bill by the Commons and the day when the government may present it for assent over the objections of the House of the Federation. This is because the House of the Federation could defer voting on a Bill until the 60th day after it had received it, and if its vote is negative, the government must wait a further 60 days before presenting the Bill for assent.
8. If the House of the Federation receives a Bill within 45 sitting days of the end of a session,



and if it takes no action on the Bill during the session, the government cannot proceed to present the Bill for assent 60 calendar days after the date the new House received the Bill. Instead, the Bill "dies" at the end of the session and would need to be reintroduced in both Houses during the following session.

9. Any urgent Bill which does not have a significant impact on federal-provincial relations, and which is not of special linguistic significance, may, if the action is authorized by a two-thirds vote in the House of Commons, be presented immediately to the Governor General for assent without the Bill having first received the approval of the new House of the Federation. Even in such urgent cases, however, the approval of the Commons for such handling of the Bill must not be sought before the new House has had at least seven days in which to consider the Bill.
10. Members of the new House would be able to initiate legislation. However, like present Senators, they would not be able to originate money Bills.
11. Members of the new House would be eligible for inclusion in the federal Cabinet, as are members of the present Senate. However, contrary to present practice, Ministers from the second chamber would be able to answer questions, and take part in debate (though not vote), in the House of Commons. Ministers who are members of the Commons would likewise be able to speak in the second chamber.
12. The approval of the new House would be required for appointments to the Supreme Court of Canada, once candidates had been selected following the new federal-provincial consultation process which is provided for in the Bill.
13. The approval of the new House would also be required for senior appointments to certain institutions that have been established by Parliament, such as federal crown corporations and regulatory bodies. The institutions in question are those which would be designated by Parliament as ones to which the new approval procedure should apply.
14. Legislative measures or provisions of "special linguistic significance" would require the approval of a "double majority" of members of the new House: that is, a majority of French-speaking members as well as a majority of English-speaking members. Moreover, given the failure of a measure to receive the approval of this "double majority," the government could not proceed after a delay of 60 days to present the measure for the assent of the Governor General, as with other legislation, without obtaining a second favourable Commons vote, and one consisting of two-thirds of the members of the Commons voting on the measure. It has been noted under 9 above that no measure of special linguistic significance may qualify as an urgent Bill. Such a measure could not therefore avoid the requirement for action by the second chamber and its "double majority."

## What Are Likely To Be The Results?

As with most political institutions it is not possible to predict precisely how the new House would operate in practice. However, it should be possible to make some sort of reasonably informed forecast.

The government's objective is to create a forum for the free expression of regional views as part of Canada's Parliament, and one that will have significant political authority without challenging the supremacy of the House of Commons. The first question to ask is whether this objective is likely to be achieved, and the second is, if it is achieved, what are likely to be the effects on Canada's political system.

The first question breaks down into three parts:

- (1) Will regional views be freely expressed?
- (2) Will the new House have significant political authority, as the result
  - (a) of its constitutional powers, and
  - (b) of the "mandate" and quality of its members?
- (3) Will the House of Commons remain supreme and effective?

If the answer to all these questions is "Yes," the government's objective will be achieved.

Will regional views be freely expressed? It has been suggested in this paper that the chances are that they will, given that both the federal government party and the official opposition are likely to have difficulty in organizing a continuing alliance of party groupings in the second chamber that will produce a majority whose main objective is to sustain or defeat the government. There are at least two reasons for this. One is the multiplicity of federal and provincial parties represented in the new chamber, all of whom will have different allegiances and objectives. The second is that legislators who are not directly elected are likely to feel inhibited about opposing the will of the directly-elected Commons solely on partisan grounds. If these suppositions are correct, the government will not, any more in practice than in

law, have to command the "confidence" of the second chamber, and party discipline is therefore likely to be less pervasive there than in the Commons, thus allowing the expression of regional views. Party allegiances will not be absent, but it can be hoped that they may be tempered by the considerations which have been mentioned.

Will the new House have significant powers under the provisions of the constitution? The answer is emphatically "Yes," although this fact has not been recognized by a number of people who have commented publicly on the Bill. It is a key question, because if the answer is "No," the government's objective as defined above will not be achieved, and there would be little point in proceeding with the establishment of the new House and with the considerable inconvenience that the change entails.

The principal criticism by those who see the answer as "No," is that the new House will have only a suspensive veto, and that its delaying power will be only 60 days. As a general principle, one ought not, in the view of the government, give a body that is not directly elected an outright veto over legislation approved by the House of Commons. However, the right to delay this legislation is a very important power indeed, as some commentators have been quick to realize, because a negative vote in the second chamber and the consequent delay will focus public attention on the issue in a way that few other devices can. If the government of the day wants to proceed with a Bill unchanged, in the face of this negative vote, it will have to have excellent arguments as to why it is not willing to compromise.

It is also reasonable to suppose that an indirectly-elected body such as the one proposed is more likely, as would no doubt be the present Senate, to use a suspensive veto than an outright veto. Whereas the new House would hesitate to use an outright veto, because of the risk of public criticism that overriding the directly-elected House of Commons would entail, it would feel less constrained about delaying a Bill in the event that it could not force upon the government a compromise that it considered acceptable.

The question of whether the delay attached to the suspensive veto should be 60 days rather than some longer period is, although important, a subsidiary one to the fact of giving the second chamber the power to delay Commons legislation. Whatever the period, the pressure will be on the government to defend its position. As was noted above, the government could, under the provisions of the Constitutional Amendment Bill, actually be forced to wait up to 120 days before it could present a Bill for assent over the objections of the new House.

The power of the new second chamber to delay legislation and to attract public attention by a negative vote is almost certain to bring about some major changes in the way that legislation is first formulated within the federal administrative apparatus and then handled in Parliament. As things stand now, the government of the day can normally count upon its control of the Commons, and upon the usual compliance of the Senate, to ensure passage of its legislation in a form that is little changed, so far as the major elements of it are concerned. With the establishment of a new House of the Federation, not controlled by the government, such relatively trouble-free passage through Parliament could no longer be counted upon. The government is most unlikely to disregard one negative vote after another by the second chamber. It is much more likely that the government will, through the minister responsible for a given piece of legislation, consult and negotiate, both in advance of the final drafting of legislation and during its examination in the second chamber, with interested members in the new House who would possibly be formed into committees for this purpose. The members and committees of the second chamber could in turn well become, along with the government, the focus for representations from the various interested groups in the country who would be affected by the legislation.

This process of representation, consultation, negotiation and compromise is likely to slow down somewhat the formulation and passing of legislation. This is the almost inevitable result of any sharing of political authority, and the government believes that

it is a worthwhile price to pay for obtaining a more visible and more broadly-based regional input into the federal legislative process.

The new House would have, in addition to the suspensive veto, significant powers in two other respects. It would be able to veto appointments to the Supreme Court and senior appointments to other designated federal institutions. And the French-speaking members of the chamber would be in a strong position to defend the French language, so far as federal legislation is concerned. It is true that the Commons could, by a two-thirds majority vote, override a rejection by the "double majority." This arrangement recognizes the ultimate supremacy of the directly-elected Commons. However, there is considerable protection against irresponsible use of this supremacy. First, the debate in the new House would allow French-speaking members fully and publicly to express their views. Second, it would not be easy to muster a two-thirds majority in the Commons in such circumstances. And third, even if in spite of these protections a law should pass which adversely affected the preservation of the language spoken by any substantial identifiable French (or English) linguistic community, there would be the possibility of challenging the law under the Charter of Rights and Freedoms.

The new House would therefore have significant constitutional power. However, the same may be said about the present Senate which has an absolute veto over Commons legislation if it chooses to use it. That the Senate rarely uses this veto testifies to the fact that members of the second chamber feel that they do not have the sort of mandate which would permit them to exercise the constitutional power which is technically theirs. Would the members of the new House of the Federation, chosen in the way that is proposed, feel that they would have a mandate to use (or threaten to use) the suspensive veto?

The answer is probably "Yes." It is worth contrasting the method by which members of the second chamber, compared with present Senators, would be chosen. At present, Senators are appointed only by the government of the day, and the



cumulative result has been that an overwhelming majority in today's Senate have been appointed by one political party. They are appointed for their working life, and there is no basis for public discussion of appointments before they are made. Under the proposed arrangements, members would be chosen by all the federal and provincial parties. Based on the most recent election results, the federal Liberal party, as distinct from the provincial Liberal parties, would nominate only 24 of 118 members of the new House (see Appendix 4). Moreover, the legislatures concerned would have the right to endorse or reject the parties' choice. There would thus be the basis for public discussion on the merits of potential members before they are elected to the second chamber. A further difference is that members would be chosen for a limited and indefinite period of time, that is, until the next federal or provincial general election, although their term could be renewed to the extent that the party retains sufficient popular support to keep its second chamber seats.

The various parties' share of seats in the new House may change with each election, but it is unlikely to change as much as their share of seats in their respective legislatures, because selection will be in proportion to the popular vote, and a party's share of a popular vote does not normally change dramatically from one election to another. According to a report in the August 2, 1978 edition of the *Toronto Globe and Mail*, only 12 of the 118 seats in the new House would have shifted between the parties if the House had existed in the past five years. Consequently, the party composition of the new House will be more stable than that of the legislatures which select its members. For this reason, and because good members can expect to have continuity of tenure, it is not likely, as some critics have suggested, that there will be wholesale changes in membership after each federal and provincial election.

Some commentators have suggested that the only change resulting from the new House will be to spread the opportunity for patronage: that the party list system used in each legislature will be used by

the federal and provincial parties concerned to reward party members by appointing them to the new House and by renewing their membership with each election. As a result, it is argued, the parties would control the way in which their nominees vote.

In the first place it should be noted that a seat in the new House will be a less attractive "reward" than a seat in the present Senate. A Senate seat is held for one's working life; but one would stand to lose a seat in the new House after any general election. It is true that a party, particularly a party with substantial popular support over the years, will always be able to count on a certain number of seats, so the question is, really, whether it is likely to nominate for these seats energetic persons of high quality.

Because a substantial number of federal and provincial parties will be represented in the new chamber, it seems unlikely that the government party in the House of Commons, or the official opposition party, will be able either on its own or in alliance with other parties to control the new House on a continuing basis. If this is the case, the new House is likely to become a lively forum for political debate. There will be no point in a party nominating a "rubber stamp" candidate, and as a result, good people should be attracted to serve in it. While "party list" systems of choosing legislators do leave some room for patronage, they also enable persons of outstanding ability to be brought into the legislative process who might not choose to enter it, or succeed in entering it, through a constituency election. Such a system also permits persons with special knowledge and experience to be brought in. For example, it is to be hoped that each legislature in choosing representatives to serve in the new House, will feel free to draw upon persons who are involved in municipal government, so that their particular perspective may find a place in the consideration of federal legislation. Competition among the parties in the new House may well result in them selecting persons of ability and useful experience. It will be up to each legislature, under public scrutiny in the discharge of its responsibility, to decide what kind of member it is going to send to the new House.

On balance it seems likely that patronage would not play as large a part in the new House as some people suppose; that the quality of members may well prove to be high, and that members will feel that they have a mandate to use or threaten to use the suspensive veto.

The other side of the coin is what worries some commentators: that the House of Commons will be continually frustrated by the new second chamber in its attempts to pass appropriate legislation. This concern is an important one and the Special Joint Committee on the Constitution, and others who are examining the Constitutional Amendment Bill, will no doubt wish to give it careful consideration. It is worth remembering however that the ultimate supremacy of the House is assured in several ways:

1. The suspensive veto may be disregarded after 60 days have elapsed (although in the case of measures of special linguistic significance a further, two-thirds Commons vote is required).
2. Certain urgent bills may be presented for assent more quickly.
3. Money bills may be introduced only in the Commons.
4. Half of the members of the second chamber are chosen by the Commons, and would stand to lose their seats following dissolution of Parliament, the date of which is usually determined by the government.

The government, in making its proposals in the Constitutional Amendment Bill, is searching for a certain balance between the two chambers, which although it ought to be weighted on the side of the House of Commons will nevertheless give the second chamber a major role in the legislative and political process. One may adjust the balance by, for example, shortening or increasing the period for

which government legislation can be delayed, or by decreasing or increasing the number of members chosen by the House of Commons.

There remains one question to be examined. If the government's objective of establishing an authoritative regional forum is achieved, what are likely to be the effects on Canada's political system? No attempt will be made here to answer in a comprehensive or definitive way such a difficult question. However, the following things may be said with reasonable certainty:

1. The new House will have greater political authority than the existing Senate.
2. The executive power of the federal government and the legislative power of the House of Commons will be tempered by the need to negotiate and compromise with the second chamber.
3. The less populous provinces and regions should enjoy an increased influence in the federal legislative process as a whole.
4. French-speaking Canadians, despite their minority position in Canada, will have a substantial degree of equality in action on federal legislation which might affect the position of the French language.
5. Federal-provincial conferences will continue to be essential for the effective coordination of federal and provincial policies, programs and activities; but to the extent that the new House fulfills its role successfully, it will share with these conferences the function of expressing and reconciling regional views about federal policies and legislation.
6. In sum, a new regional forum will have been established which should contribute in a significant way to the renewal of our federal system.

## Conclusion

The government is aware that the proposals for the establishment of the new House are likely to have important consequences for the Canadian political system, and that some of the effects of the new second chamber are difficult to forecast. The detailed and specific nature of the Constitutional Amendment Bill is designed to make the examination of the government's proposals easier, and it is hoped that this paper will also contribute to the process of discussion and assessment.





## APPENDIX 1

### The German System and the Bundesrat

Germany has a distinctive type of federal system in which most legislative power is concentrated at the centre, and in which much of the central legislation is administered not by the central government but by the provinces. A high degree of institutionalized coordination is therefore essential, because in broad terms it may be said that the specialty of the central authorities (the Bund) is legislation and the specialty of the provincial authorities (the Laender) is administration. This "division of labour" is, therefore, a principal justification for having an "upper" house of the federal legislature composed of provincial (Land) ministers who vote on the instructions of their government. This upper house is called the Bundesrat.

Although the Bundesrat and administration of federal laws by the Laender have their roots in the 19th century, the present German Constitution (the Basic Law) dates from 1949. In modern Germany, uniformity rather than diversity is the rule, because of the concentration of legislative authority at the centre. For example, the most important tax laws and rates are set by federal legislation and are uniform across Germany. Diversity is possible only in the small area of autonomy reserved to the Land legislatures and to some extent in the Land administration of most federal laws.

A further important feature of the German parliamentary system is that elections take place normally every four years at regular intervals. Members of the federal lower house are elected by proportional representation. Half of the members are elected on a constituency basis and half are selected by the political parties from a party list.

The main provisions regarding the Bundesrat are as follows:

1. Each Land has three, four or five seats depending on its population. Population size is more disparate than the number of seats, so that the smaller Laender receive a proportionately bigger vote. Each Land's vote must be cast as a block, on the instructions of the Land government.
2. Before federal legislation is tabled in the lower house, the Bundestag, it must be submitted to the Bundesrat for a preliminary statement of position by the latter. This provision results in much prior negotiation and adjustment of legislation. The Bundesrat is given six weeks (three in urgent cases), to express its position.
3. The Bundesrat itself may initiate legislation, but it does not often do so.
4. The Bundesrat has to approve all federal legislation, and most decrees and statutory instruments. It has an outright veto over legislation affecting the interests and duties of the Laender; this legislation, some of which is specified in the Constitution, accounts for the majority of all bills, more than was originally expected. Unspecified legislation which affects the interests and functions of the Laender is also subject to an outright veto, and the limits of this unspecified category are ultimately determined by the Constitutional Court.
5. The Bundesrat rarely opposes legislation which does not directly affect the Laender. If it does, its opposition may be overridden by the Bundestag. The formula is as follows. If the objection was adopted with the majority of the votes of the Bundesrat, it can be rejected by a decision of the majority of the members (i.e., not just those voting) of the Bundestag. If the Bundesrat adopted the objection with a majority of at least two-thirds of its votes, its rejection by the Bundestag shall require a majority of two-thirds, including at least the majority of the members of the Bundestag.
6. The Bundesrat also has a role in various appointments. It elects half of the members of the Constitutional Court.
7. A two-thirds majority of both houses voting separately is required for constitutional amendments. No Land has a veto. Constitutional amendments are more frequent than in

Canada, but not numerous. In practice, the support of both of the major national parties is needed.

Most national issues in Germany are party political issues rather than federal-Land issues. The parties and the Bundestag dominate political life, despite the important role of the Bundesrat. The major role of the parties, whose federal and Land branches are for the most part highly integrated, can hardly be overstated. Within them, many interregional and federal-Land conflicts are reconciled.

The Bundesrat has over the years been very successful in that it has been able to influence the content of federal legislation without having to reject ultimately more than a comparatively small number of bills. Some of this success may be due to the fact that, for most of the period since the Basic Law was introduced in 1949, the Bundesrat has been controlled by the same party or coalition that governed in the Bundestag. Since 1972, when the Socialist-Liberal (SPD-FDP) coalition took over the government, the Bundesrat has been narrowly controlled by the opposition (the Conservative CDU-CSU coalition), and this has made the role of the Bundesrat somewhat more controversial. This opposition control did for a while depend marginally upon the Liberals, the smallest of the three national parties, who, while still forming a government coalition with the Socialists in the lower house, had formed coalitions with the Conservatives in two of the provincial governments which are represented in the Bundesrat. However, as the result of a recent election in Lower Saxony, the CDU Land government there no longer depends on the Liberals to govern and therefore the CDU-CSU can now control the Bundesrat without the help of the Liberals.

If in October, 1978, the CDU wins Hesse (an important Land with four Bundesrat seats) from the SPD-FDP coalition, the CDU-CSU will control two-thirds (28) of the seats in the Bundesrat and will be able to block *all* government legislation, because a two-thirds vote in the Bundesrat must be overridden by an equivalent Bundestag vote, and this could not be obtained without CDU-CSU cooperation. How-

ever, it should be noted that the CDU-CSU control of two-thirds of the seats in the Bundesrat would depend on controlling the three seats of the Saarland. This Land is governed by a coalition between the CDU and the Liberal FDP party. Without the Saarland, the CDU-CSU would have, even with Hesse, only 25 of the 41 votes in the Bundesrat.

Whether the Bundesrat from time to time plays a role that is definitely partisan or less so, it is an important element of the complex of constitutional and political factors in Germany which requires a national consensus to implement any really major constitutional or legislative change in that country. One other major element is the modified system of proportional representation which is used for elections. As in Bonn, coalition governments are the rule in most of the Laender. This facilitates some alliances in the Bundesrat across party lines.

While the efficiency of the German system is acknowledged by various observers, there are a number of broadly-based criticisms: that the degree of uniformity in Germany is excessive and inconsistent with a genuine federal system; that the emphasis on executive consultation and coordination stifles democratic processes, and that the imperative of compromise too often militates against vigorous government in favour of the "lowest common denominator."<sup>1</sup> One criticism of the Bundesrat itself is that the Land legislatures have little influence over

<sup>(1)</sup> For two recent assessments of the German system see Gunter Kisker, "Unitarian and Cooperative Federalism: A Changing Concept of Federalism in West Germany?" and Gerhard Lehmbuch, "Federalism and the Problem of Party Government in West Germany." Both papers were given at the Workshop on Comparative Federalism held at Queen's University, Kingston, in August, 1977.

For a discussion of the operation of the German upper house, the *Bundesrat*, see:

- Nevil Johnson, *Federalism and Decentralization in the Federal Republic of Germany*, Research Paper No. 1 for the U.K. Commission on the Constitution, H.M.S.O. London, 1973
- R.L. Watts, "Second Chambers in Federal Political Systems," Volume 2, Background Papers and Reports, Ontario Advisory Commission on Confederation, Toronto, 1970.
- R.M. Burns, "Second Chambers: German Experience and Canadian Needs," *Canadian Public Administration*, Winter, 1975.
- Albert Pflitzer, *The Bundesrat*, Press and Information Office of the Government of the Federal Republic of Germany, 1972.

the positions that Land Ministers adopt in the Bundesrat.

There is rarely any discussion in the legislatures of questions before the Bundesrat. Because the Bund has pre-empted virtually all concurrent jurisdiction, the Land legislatures are left with little to do, and they have some difficulty attracting good candidates for office. Executive level federal-Land agreements

about various shared-cost activities also tend to make it difficult for Land legislatures to have an input even in some of those fields which remain under Land jurisdiction. It has been argued by some critics that a Land's representation in the Bundesrat should be drawn from all political parties in the Land legislature, and not just from the Land government party or coalition.





## APPENDIX 2

### Directly-Elected Second Chambers

#### Australia

The Australian Senate has the following characteristics:

- (a) There are 10 members from each of the six states, each state is a single constituency, and candidates are elected from a list on the basis of proportional representation. As the result of a recent constitutional amendment, there are in addition two members from each of the Australian Capital Territory and the Northern Territory.
- (b) Members are elected for a six-year term, half being elected every three years. Vacancies among members representing the states are filled by a replacement appointed by the state premier. It has been a convention and is now constitutionally required that the replacement member be of the same political party.
- (c) The Senate may initiate legislation other than a money bill. It may not, in theory, amend money bills but in practice it does so by requesting the lower house to amend. It may veto any bill, including a money bill or any vote of Supply.
- (d) The Government need not, legally speaking, command the confidence of the Senate in order to survive.
- (e) Three months after a Senate veto the government may re-introduce a bill. If there is continued deadlock, the Governor General may dissolve both houses and call for elections. This has happened three times. Following the elections a joint sitting decides on the bill. This has never been necessary, because the three elections have returned houses controlled by the same party.

Constitutional amendment in Australia is by referendum, a majority being required in four of the six states as well as an overall majority. Before being submitted to popular vote, a proposed amendment is usually approved by both Houses of Parliament. However, an amendment may originate in either

house, and if the other house rejects the proposal, the Governor General may nevertheless submit it to a referendum. Some proposals, such as those to reduce a state's share of Senate and lower house seats, require the approval of the majority of the state's electors voting in a referendum (Article 128 of the Constitution).

Party influence predominates over regional loyalty in the Senate. It is the state governments which are the principal spokesmen for the regions. Consequently, the Senate's role as a states' house has been limited. It does represent all states equally, and the smaller states attach value to that. Also, the premiers do bring pressure on their state's senators to take a particular stand on any given issue, and the premiers can within limits oppose at subsequent Senate elections those senators who are not responsive to this pressure. A few senators are able to secure elections as independents, despite the difficulty of doing this with a constituency as large as a state. They find it easier to do this when voters are disenchanting with the political parties.

Despite these qualifications, it remains true that confrontation in the Senate is largely an extension of the inter-party conflict in the lower house. The sharp dividing lines of this conflict have to some extent been muted as the result of the introduction of proportional representation for Senate elections in 1949. The "P.R." system was introduced by the Labour Party to serve its own interests, but ironically the party split shortly afterwards, and the splinter group, the Democratic Labour Party, eventually obtained the balance of power in the Senate in 1967. Neither of the two major parties regained a majority of Senate seats until 1975.

"Double dissolution," the only way of overcoming persistent Senate opposition, is a blunt or excessively weighty instrument. It was last used in late 1975 as the result of the Senate denying Supply, and gave rise to a constitutional crisis.

The regular timing of Senate elections (half of the Senate is elected every three years, although some



"leeway" is allowed as to the precise three-year interval) contrasts with the less regular timing of elections for the House of Representatives. The government of the day has to engage in some difficult calculations about the best time to dissolve the lower house and to call for elections in relation to the timing of the next Senate election.

As noted, control of both houses is most desirable for a government in Australia. A proposed constitutional amendment that would have required automatic dissolution of the Senate to coincide with dissolution of the house has recently been defeated in a referendum. The proposal had received the support of both major political parties, reflecting their unhappiness with the Senate regarding its part in the dissolution crisis of late 1975 which brought about the fall of the Whitlam government. One of the arguments in support of the proposed amendment was that with a fixed term senators become no longer representative of their electors. Another argument was the cost of separate Senate elections.

The Senate serves of course as a house of review. In the last 10 years its committees, and particularly the joint House-Senate committees, have earned some praise, since they are now reckoned to be more useful than the committees of the lower house. Legislation in the House of Representatives is generally subject to less discussion than in the Canadian House of Commons, and such discussion usually takes place on the floor of the house rather than in committees. Consequently, the Senate and joint committees help to fill a need so far as examination of legislation is concerned.

The Australian federation would not have been formed without a Senate along the lines of the present one, and to dispense with the Senate now is virtually impossible. In a system of parliamentary government, the Senate has emerged as a source of controversy. The main reason could be that it has somewhat too much power vis-à-vis the House of Representatives. The failure of the recent constitutional amendment regarding automatic dissolution is

evidence of the difficulty of attenuating the Senate's power.

## Switzerland

The Swiss second chamber, the Council of States, is composed of 44 directly-elected representatives, two from each of the 19 cantons and one from each of the six half-cantons. The second chamber has powers that are identical with those of the lower house, the 200 member National Council. Elections for both houses, which together compose the National Assembly, are held every four years. The two houses meet in joint session to elect the seven-member executive, the Federal Council. Once elected, the members of the executive are not allowed to be members of the National Assembly. The office of president rotates annually among the members of the Federal Council.

The manner of electing members to the second chamber depends on cantonal law. Until recently, there was a certain amount of variation because some cantons used the method of indirect election by cantonal legislatures. Members of the second chamber may also hold a seat in a cantonal legislature (although some cantons limit the numbers of members of their legislature and executive who may hold both positions), but they are forbidden by the federal Constitution from "voting on instructions."

An expert group, the so-called Wahlen group, was established in May, 1967 to determine whether a total revision of the Constitution was desirable. The group's report was submitted to the Federal Councillor for Justice and Police in 1972. The group examined three questions concerning the Council of States.

The first is that perhaps the Council of States should be given a special role, different from that of the National Council, with regard to matters affecting cantonal jurisdiction. It has been proposed that the council should be like the German Bundesrat,

with the members representing the cantonal governments. It has also been proposed, as an alternative, that the Council be given special powers with regard to federal laws affecting the cantons. Neither of these proposals found favour with the Wahlen group, nor with the Commission of Experts that succeeded it and which put forward a text for a new federal Constitution in 1977.<sup>1</sup>

Second, there is criticism of the disparity between population and representation of the various cantons and half cantons. A departure from "rep by pop" is of course inherent in the idea of a federal second chamber representing equally each constituent state of the federal union, as is the case with the United States Senate. The German Bundesrat and the Canadian Senate, while far from being based on "rep by pop," do make some concession to it, and this is what some people in Switzerland—including the Wahlen group—would like to see adopted for the Council of States. In Switzerland the population-representation disparity is aggravated by the existence of half-cantons. For example, the half-canton of Basel City has six times the population of each of the full cantons of Uri and Glarus.

The Wahlen group recommended that some concession be made to "rep by pop" by increasing to some degree the number of seats of the more populous cantons. The Commission of Experts has recommended in its "Projet de Constitution" of 1977 that the four least populous half-cantons should have only one seat each, and that the other cantons and half-cantons should have two seats each. The commission also noted a possible variant of this, which would give the 16 most populous cantons a third seat each.

The third principal criticism is that the Council of States under-represents the left wing of Swiss politics, notably the Socialist party. The Wahlen group

found this under-representation regrettable, and said that the explanation lies in the mode of election, which is determined by cantonal law. Apparently, because there are only two members from each canton the majority system of election is used in most cantons in preference to the system of proportional representation, and the Socialist party rarely captures the majority vote. The Wahlen group pointed out that the situation could be improved both by changing the system of election—a matter for the cantonal authorities—and by increasing the number of seats. The Commission of Experts has recommended that a system of proportional representation be used to elect members to the Council of States, and that this be specified in the federal Constitution.

## The United States

Under the Articles of Confederation (1781-89), the newly independent United States of America formed an alliance and a Continental Congress with very limited powers. Representation in the Congress was based on the equality of statehood rather than on population. However, weaknesses in the Confederation soon became apparent and a Federal Convention met in Philadelphia in 1787 with the purpose of amending the Articles. In the end, the convention proposed a new federal Constitution (which came into effect in 1789) rather than a set of amendments. Representation in the new Congress was a particularly thorny question at the convention. Small states, such as New Jersey, objected to the proposal for representation by population put forth by the larger states like Virginia. A compromise was struck with the acceptance of a bicameral legislature, with representation on the basis of population in one house (the House of Representatives) and equality of representation in the other (the Senate).

Because of the separation of powers and the system of "checks and balances" adopted by the convention, the president and the Congress would be politically independent of each other and yet they

<sup>(1)</sup> *Rapport and Projet de Constitution*, Commission d'experts pour la préparation d'une révision totale de la Constitution fédérale, Office central fédéral des imprimés et du matériel, Berne 1977.

would be functionally interdependent. Only Congress could pass laws and both houses would have to concur, but a law adopted by Congress would take effect only if signed by the president. Consequently, there would be consultations and negotiations between the executive and legislative branches of the American government in developing the legislative program during a session of Congress, but the president would not be "responsible", before Congress and the "Government" could not fall for want of confidence. Party discipline, therefore would not be essential to the operation of Congress.

If the Senate was designed to provide for equality of representation of the several states, it was also intended that it should act as a stable and "mature" check on the exercise of power by the popular house. While the whole House of Representatives was to be re-elected every two years, one-third of the Senate was to be re-elected at two year intervals; the term of a representative was two years, while that of a senator was six; representatives had to be at least 25 years old, while senators had to be at least 30; representatives were to be elected indirectly, that is by the state legislatures. According to James Madison, the longer tenure of senators was meant to serve as an obstacle to the instability which experience "had shown to be the besetting infirmity of popular Governments."

In 1913, the Constitution of the United States was amended to provide for the election of senators

directly in each state by those persons having the qualifications requisite for electors of the larger of the two houses of the state legislature. (All states, save one, have bicameral legislatures.) Each of the 50 states is now represented by two popularly elected senators whose six year terms do not coincide. Therefore, only one senator is elected in a state at a time. Each senator represents the whole state rather than a constituency within the state.

In addition to its normal legislative responsibilities, the Senate has several special functions. The Senate alone has the power to try all impeachments of public officials, including the president. The Senate, by simple majority vote, controls the president's appointment of ambassadors, of judges of the Supreme Court, and of certain senior officers (notably the members of the Cabinet) of the United States. Two-thirds of the senators present must concur in a treaty proposal before it may be ratified. Finally the Senate and the House of Representatives, whenever two-thirds of both houses deem it necessary, may propose amendments to the Constitution or shall call, on application of the legislatures of two-thirds of the states, a convention for proposing amendments.

The longer tenure of senators and the special role they play in ratifying treaties and in approving key presidential nominations account in large measure for the greater prestige enjoyed by the Senate today in comparison with the House of Representatives.

## APPENDIX 3

**The distribution of seats in the present  
Senate and in the proposed House of the Federation**

	Share of total Population <sup>1</sup>	Present Senate		House of the Federation	
		Seats	%	Seats	%
Yukon	.1	1	1.0	1	.8
Northwest Territories	.2	1	1.0	1	.8
TERRITORIES	.3	2	1.9	2	1.7
British Columbia	10.8	6	5.8	10	8.5
Alberta	8.3	6	5.8	10	8.5
Saskatchewan	4.0	6	5.8	8	6.8
Manitoba	4.4	6	5.8	8	6.8
WEST	27.5	24	23.1	36	30.5
ONTARIO	36.0	24	23.1	24	20.3
QUEBEC	26.8	24	23.1	24	20.3
Nova Scotia	3.6	10	9.6	10	8.5
New Brunswick	3.0	10	9.6	10	8.5
Prince Edward Island	.5	4	3.9	4	3.4
Newfoundland	2.4	6	5.8	8	6.8
ATLANTIC	9.5	30	28.9	32	27.1
Total	100.0	104	100.0	118	100.0

<sup>1</sup>Based on population estimates for January, 1978, as published in *Canadian Statistical Review*, Statistics Canada, April, 1978.



## APPENDIX 4

### House of the Federation

Distribution of seats among political parties,  
based on the popular vote in the most recent elections

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#### NATIONAL TOTALS

(See attached table for  
distribution by province and territory)

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Liberals	41
Progressive Conservatives	42
National Democratic Party	21
Social Credit & Créditiste	7
Parti Québécois	5
Union Nationale	2
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**Distribution of seats among political parties,  
based on the popular vote in the most recent elections**

	Total Seats	Selected by House of Commons (except for Yukon and N.W.T.)				Selected by provincial legislatures					
		LIB	PC	NDP	SC	LIB	PC	NDP	SC	PQ	UN
Yukon	1	—	1	—	—						
N.W.T.	1	—	—	1	—						
TERRITORIES	2	—	1	1	—						
British Columbia	10	2	2	1	—	—	—	2	3	—	—
Alberta	10	1	3	1	—	—	3	1	1	—	—
Saskatchewan	8	1	2	1	—	1	1	2	—	—	—
Manitoba	8	1	2	1	—	—	2	2	—	—	—
WEST	36	5	9	4	—	1	6	7	4	—	—
ONTARIO	24	6	4	2	—	4	5	3	—	—	—
QUEBEC	24	6	3	1	2	4	—	—	1	5	2
Nova Scotia	10	2	2	1	—	2	2	1	—	—	—
New Brunswick	10	2	2	1	—	3	2	—	—	—	—
P.E.I.	4	1	1	—	—	1	1	—	—	—	—
Newfoundland	8	2	2	—	—	2	2	—	—	—	—
ATLANTIC	32	7	7	2	—	8	7	1	—	—	—
Total	118	24	24	10	2	17	18	11	5	5	2



Government  
of Canada

Gouvernement  
du Canada



Gouvernement  
du Canada

Government  
of Canada

# CHAMBRE DE LA FÉDÉRATION

Répartition des sièges entre les partis politiques,  
établie en fonction des suffrages exprimés aux plus récentes élections

Comblés par la Chambre des communes (sauf le Yukon et les T.N.-O.)										Comblés par les assemblées législatives provinciales									
LIB					PC					LIB					PC				
NPD					CS					NPD					CS				
PQ					UN					PQ					UN				
Total des sièges					Total des sièges					Total des sièges					Total des sièges				
Yukon	1	—	—	1	—	—	—	—	—	1	—	—	—	—	1	—	—	—	—
T.N.-O.	1	—	—	—	—	—	—	—	—	1	—	—	—	—	—	—	—	—	—
TERRITOIRES	2	—	1	1	—	—	—	—	—	2	—	1	1	—	3	—	—	—	—
Colombie-Britannique	10	2	3	1	—	—	—	—	—	10	2	3	1	—	—	—	—	—	—
Alberta	10	1	1	1	—	—	—	—	—	10	1	1	1	—	—	—	—	—	—
Saskatchewan	8	1	2	1	—	—	—	—	—	8	1	2	1	—	—	—	—	—	—
Manitoba	8	1	2	1	—	—	—	—	—	8	1	2	1	—	—	—	—	—	—
QUEST	36	5	9	4	—	—	—	—	—	36	5	9	4	—	—	—	—	—	—
ONTARIO	24	6	4	2	—	—	—	—	—	24	6	4	2	—	—	—	—	—	—
QUÉBEC	24	6	3	1	2	4	—	—	—	24	6	3	1	2	4	—	—	—	—
Nouvelle-Écosse	10	2	2	1	—	—	—	—	—	10	2	2	1	—	—	—	—	—	—
Nouveau-Brunswick	10	2	2	1	—	—	—	—	—	10	2	2	1	—	—	—	—	—	—
Ile-du-Prince-Édouard	4	1	1	—	—	—	—	—	—	4	1	1	—	—	—	—	—	—	—
Terre-Neuve	8	2	2	—	—	—	—	—	—	8	2	2	—	—	—	—	—	—	—
ATLANTIQUE	32	7	7	2	—	—	—	—	—	32	7	7	2	—	—	—	—	—	—
Total	118	24	24	10	2	24	24	10	2	118	24	24	10	2	24	24	10	2	2

## Annexe 4

### CHAMBRE DE LA FÉDÉRATION

Répartition des sièges entre les partis politiques,  
établie en fonction des suffrages exprimés aux plus récentes élections

#### TOTAUX GÉNÉRAUX À L'ÉCHELLE DU PAYS

(la répartition par province et territoire figure au tableau suivant)

Libéraux	41
Progressistes conservateurs	42
Nouveau parti démocratique	21
Crédit social & Créditistes	7
Parti Québécois	5
Union nationale	2
	<u>118</u>



La répartition actuelle des sièges au Sénat et celle qui est proposée pour la Chambre de la Fédération

	Proportion de la popula- tion totale <sup>1</sup>	Sénat actuel	Sièges %	Chambre de la Fédération	Sièges %
Yukon	.1	1	1.0	1	.8
Territoires du Nord-Ouest	.2	1	1.0	1	.8
TERRITOIRES	.3	2	1.9	2	1.7
Colombie-Britannique	10.8	6	5.8	10	8.5
Alberta	8.3	6	5.8	10	8.5
Saskatchewan	4.0	6	5.8	8	6.8
Manitoba	4.4	6	5.8	8	6.8
OUEST	27.5	24	23.1	36	30.5
ONTARIO	36.0	24	23.1	24	20.3
QUÉBEC	26.8	24	23.1	24	20.3
Nouvelle-Écosse	3.6	10	9.6	10	8.5
Nouveau-Brunswick	3.0	10	9.6	10	8.5
Île-du-Prince-Édouard	.5	4	3.9	4	3.4
Terre-Neuve	2.4	6	5.8	8	6.8
ATLANTIQUE	9.5	30	28.9	32	27.1
Total	100.0	104	100.0	118	100.0

<sup>1</sup>D'après l'évaluation de la population en janvier 1978, publiée dans la *Revue statistique du Canada*, Statistique Canada, avril 1978.

pouvoir de destituer les fonctionnaires, y compris le président. Le Sénat, par voie d'une simple majorité, contrôle les nominations effectuées par le président, c'est-à-dire celles des ambassadeurs, des juges de la Cour suprême et de certains hauts fonctionnaires (notamment les membres du Cabinet). Les deux tiers des voix exprimées par les sénateurs sont nécessaires pour qu'un projet de traité puisse être ratifié. Enfin, le Sénat et la Chambre des représentants, lorsque les deux tiers des deux Chambres le jugent nécessaire, peuvent proposer des modifica-

tions à la Constitution ou peuvent convoquer, à la demande des législatures des deux tiers des États, une convention destinée à proposer des modifications. La longueur du mandat des sénateurs et leur rôle spécial dans la ratification des traités, de même que dans l'approbation des nominations présidentielles, expliquent en grande partie pourquoi le Sénat jouit aujourd'hui d'un plus grand prestige que la Chambre des représentants.

## Etats-Unis

augmentant le nombre de sièges. La Commission d'experts a recommandé le recours à un système de représentation proportionnelle pour élire les membres du Conseil des Etats, ainsi que l'incorporation de cette modification dans la Constitution fédérale.

En vertu des Articles de confédération (1781-1789), les Etats-Unis d'Amérique, nouvellement indépendants, formèrent une alliance et constituèrent un Congrès continental doté de pouvoirs très limités. La représentation au Congrès était fondée sur l'égalité des Etats plutôt qu'en fonction de la population. Cependant, des faiblesses se manifestèrent rapidement dans la Confédération et une Convention fédérale fut convoquée à Philadelphie en 1787 afin de modifier les Articles. La Convention finit par proposer une nouvelle constitution fédérale (qui entra en vigueur en 1789) plutôt qu'un ensemble de modifications. La question de la représentation au nouveau Congrès fut l'objet de nombreuses controverses durant la Convention. Les petits Etats, comme le New Jersey, s'opposèrent à l'idée de la représentation sur la base de population avancée par les plus grands Etats comme la Virginie. On en arriva à un compromis avec l'acceptation d'une législature bicamérale; dans une des Chambres (Chambre des représentants) la représentation était en fonction de la population et dans l'autre (le Sénat) la représentation était égale.

La séparation des pouvoirs et le système des «poids et contrepoids» adoptés par la Convention rendaient le président et le Congrès politiquement indépendants l'un de l'autre, quoiqu'interdépendants sur le plan fonctionnel. Seulement le Congrès devait pouvoir passer des lois, avec l'assentiment des deux Chambres toutefois; mais une loi adoptée par le Congrès ne pouvait prendre effet qu'une fois signée par le président. On avait prévu, en conséquence, que des consultations et des négociations auraient lieu entre les appareils exécutif et législatif du gouvernement américain durant l'élaboration du

programme législatif de chaque session du Congrès, mais que le président ne serait pas responsable devant le Congrès et que le gouvernement ne pourrait être battu à cause d'un manque de confiance. La discipline de parti, par conséquent, ne serait pas nécessaire au fonctionnement du Congrès.

Bien que le Sénat ait été conçu afin d'assurer l'égalité de la représentation des divers Etats, on avait prévu également qu'il jouerait un rôle de stabilisation et de pondération relativement à l'exercice de pouvoirs par la Chambre populaire. Alors que l'ensemble de la Chambre des représentants devait être réélu à tous les deux ans, un tiers du Sénat devait être réélu à des intervalles de deux ans; le mandat d'un représentant devait être d'une durée de deux ans, alors que celui d'un sénateur devait être de six ans. Les représentants de la Chambre basse devaient avoir au moins vingt-cinq ans, et les sénateurs au moins trente ans; les représentants de la Chambre basse devaient être élus directement par la population, alors que les sénateurs devaient être élus indirectement, c'est-à-dire par les assemblées législatives des Etats. Selon James Madison, la durée plus longue du mandat des sénateurs devait faire obstacle à l'instabilité que l'expérience avait démontré comme étant le handicap des gouvernements populaires.

En 1913, la Constitution des Etats-Unis a été modifiée afin de prévoir l'élection des sénateurs au suffrage direct dans chaque Etat par les personnes ayant le statut d'électeurs relativement à la plus grande des deux Chambres de l'assemblée législative de l'Etat. (Tous les Etats, sauf un, ont des législatures bicamérales). Chacun des cinquante Etats est actuellement représenté par des sénateurs élus au suffrage direct et dont les mandats de six ans ne coïncident pas. Ainsi, seulement un sénateur à la fois est élu dans chaque Etat. Chaque sénateur représente l'ensemble de l'Etat plutôt qu'une circonscription particulière de l'Etat.

Outre sa fonction législative normale, le Sénat possède plusieurs fonctions spéciales. Il a seul le

compte un nombre égal de représentants pour chaque Etat de l'union fédérale, comme c'est le cas au Sénat américain, s'écarter évidemment du principe de la représentation sur la base de population. Le Conseil fédéral (Bundesrat) allemand et le Sénat canadien, loin d'être constitués conformément au principe de la représentation sur la base de population, y font quand même certaines concessions, et c'est ce que certaines personnes en Suisse, y compris le groupe Wahlen, voudraient voir adopter pour le Conseil des Etats. En Suisse, l'écart entre la population et la représentation est aggravé par l'existence de demi-cantons. Par exemple, le demi-canton de la ville de Bâle compte six fois la population de chacun des cantons d'Uri et de Glarus.

Le groupe Wahlen a recommandé de faire certaines concessions relativement à la représentation sur la base de population, en augmentant dans une certaine mesure le nombre de sièges des cantons les plus peuplés. La Commission d'experts a recommandé dans son projet de Constitution de 1972 que les quatre demi-cantons moins peuplés n'aient droit qu'à un siège chacun, et que les autres cantons et demi-cantons aient deux sièges chacun. La Commission a également mentionné une autre possibilité à cet égard, à savoir que les seize cantons les plus peuplés aient droit à un troisième siège chacun.

La troisième grande critique porte sur le fait que le Conseil des Etats sous-représente l'aile gauche des partis politiques suisses, notamment le Parti socialiste. Le groupe Wahlen a déclaré regretter qu'il en soit ainsi, et s'est dit d'avis que l'application se trouve dans le mode d'élection, qui est déterminé par la loi des cantons. Apparemment, le système d'élection dit «de la majorité» est utilisé dans la plupart des cantons de préférence au système de représentation proportionnelle, et le Parti socialiste Wahlen a fait remarquer qu'on pourrait améliorer la situation à la fois en modifiant le mode d'élection, et en question qui relève des autorités cantonales, et en

Les membres de la Chambre haute sont élus conformément aux lois cantonales. Jusqu'à ces derniers temps, le mode d'élection des membres n'était pas le même dans tous les cantons; dans certains, ils étaient élus au suffrage indirect par les assemblées législatives. Les membres ont le droit de siéger également à une assemblée de canton quoiqu'ils étaient élus au suffrage indirect par les assemblées législatives et de leur exécutif qui peuvent occuper les deux charges. La Constitution fédérale interdit toutefois aux membres de la Chambre haute de voter «sur instruction».

Un groupe d'experts, appelé groupe Wahlen, a été établi en mai 1967 afin de déterminer s'il était opportun de réviser complètement la Constitution. Il a remis son rapport au Conseiller fédéral de la Justice et de la Police en 1972. Le groupe s'est penché sur trois questions touchant le Conseil des Etats.

D'abord, il a étudié la possibilité de confier au Conseil des Etats un rôle spécial, différent de celui du Conseil national, relativement aux questions touchant la compétence des cantons. On avait proposé que le Conseil ressemble au Conseil fédéral (Bundesrat) allemand, ses membres représentant les administrations cantonales. On avait en outre proposé, comme solution de rechange, que soient accordés au Conseil des pouvoirs spéciaux au chapitre des lois fédérales qui touchent les cantons. Aucune de ces propositions n'a reçu l'approbation du groupe Wahlen, ni de la Commission d'experts qui lui a succédé. Cette dernière a rédigé un projet de constitution fédérale nouvelle en 1977.

En deuxième lieu, des critiques avaient été formulées relativement à l'écart qui existe entre la population et la représentation des divers cantons et demi-cantons. L'idée d'une Chambre «haute» fédérale qui

<sup>1</sup> Rapport et Projet de Constitution, Commission d'experts pour la préparation d'une révision totale de la Constitution fédérale, Office fédéral des imprimés et du matériel, Berne 1977.



Le Sénat sert évidemment de Chambre de révision. Au cours des dix dernières années, ses comités, particulièrement les comités de la Chambre et du Sénat, ont mérité des éloges, puisque l'on reconnaît maintenant qu'ils sont plus utiles que les comités de la Chambre basse. En général, la Chambre des représentants passe moins de temps à discuter d'une loi que ne le fait la Chambre des communes du Canada, et la loi est soumise habituellement à l'examen de la Chambre plutôt qu'à celui de ses comités. Par conséquent, le rôle des comités du Sénat et des comités mixtes est utile pour l'examen des lois.

La fédération australienne n'aurait pas pu être constituée si elle avait été privée d'un Sénat comme celui d'aujourd'hui, et il serait presque impossible maintenant de le supprimer. Sous un régime parlementaire, la création du Sénat a été source de controverse, ce qui peut être attribuable au fait qu'il possède un peu trop de pouvoirs vis-à-vis de la Chambre des représentants. Le rejet de la récente proposition qui visait à modifier la Constitution relativement à la dissolution automatique prouve à quel point il est difficile de restreindre les pouvoirs du Sénat.

## Suisse

La Chambre haute de la Suisse, ou Conseil des Etats, est composée d'un membre pour chaque demi-canton et de deux membres pour chaque canton, soit de quarante-quatre membres au total. Ses pouvoirs sont les mêmes que ceux de la Chambre basse, ou Conseil national, lui-même composé de 200 membres. L'élection des membres des deux Chambres se réunissent conjointement l'Assemblée nationale, à lieu tous les quatre ans. Les deux Chambres se réunissent pour élire les sept membres de l'exécutif, ou Conseil fédéral. Après leur élection, ceux-ci ne peuvent faire partie de l'Assemblée nationale. Ils occupent à tour de rôle le poste de président pour une période d'un an.

de servir ses propres intérêts, mais ironie du sort, une scission s'est produite peu après au sein du parti, et le groupe séparé, qui est le parti travailliste démocratique, a finalement commandé l'équilibre des partis au Sénat en 1967. Aucun des deux partis principaux n'a repris la majorité des sièges sénatoriaux avant 1975.

La «double dissolution», qui constitue la seule façon de contrecarrer l'opposition tenace du Sénat, est un instrument étonné ou du moins très lourd. Lorsqu'il a été utilisé en 1975 après que le Sénat eut rejeté le budget déposé, il a provoqué une crise constitutionnelle.

Les élections du Sénat ont lieu à des intervalles réguliers (la moitié des sénateurs sont élus tous les trois ans, quoiqu'il puisse y avoir un certain délai entre les intervalles de trois ans) comparativement à celles de la Chambre basse qui reviennent à des intervalles moins réguliers. Le gouvernement actuel doit se livrer à des calculs difficiles en vue de déterminer le temps idéal pour dissoudre la Chambre basse et réclamer la tenue d'élections, par rapport au moment où auront lieu les prochaines élections du Sénat.

Comme il a été signalé, il est très souhaitable qu'un gouvernement australien détienne la majorité des sièges dans les deux chambres. Dernièrement, une proposition qui visait à modifier la Constitution et qui aurait nécessité la dissolution du Sénat de façon à ce qu'elle coïncide avec celle de la Chambre, a été rejetée par voie de référendum. Les deux principaux partis politiques ont appuyé cette proposition, faisant ainsi état de leur insatisfaction à l'égard du Sénat, à la suite du rôle qu'il avait joué à la fin de 1975 dans la crise de dissolution qui entraînera la chute du gouvernement Whitlam. Deux des arguments avancés en faveur de la modification proposée était que les sénateurs, avec leur mandat fixe, n'étaient plus représentatifs de leurs mandants, et que les élections sénatoriales tenues à part étaient trop coûteuses.

# Annexe 2

## Chambres hautes élues au suffrage direct

### Australie

Le Sénat australien a les caractéristiques suivantes :

- (a) Il compte dix membres de chacun des six États; chaque État constitue une seule circonscription; et les candidats sont élus d'après une liste établie suivant la représentation proportionnelle. Par suite d'une récente modification constitutionnelle, le Sénat compte deux membres de plus, soit l'un du territoire de la capitale australienne et l'un du territoire du Nord.

- (b) Le mandat de ses membres est de six ans, la moitié d'entre eux étant élus tous les trois ans. Les vacances des sièges des représentants des États sont comblées par des remplaçants nommés par le premier ministre de l'État. Il a été d'usage et il est maintenant obligatoire en vertu de la Constitution qu'un membre remplaçant soit du même parti politique.

- (c) Le Sénat peut introduire toute mesure législative autre qu'une loi de finances. En théorie, il ne peut amender des lois de finances, mais, en pratique, il demande à la Chambre basse d'y apporter des amendements. Il peut opposer son veto à tout projet de loi, y compris ceux portant affectation de crédits.

- (d) Le gouvernement n'est pas légalement tenu d'avoir la confiance du Sénat pour subsister.

- (e) Le gouvernement peut réintroduire un projet de loi trois mois après que le Sénat a opposé son veto. Si l'impasse persiste, le gouverneur général a le pouvoir de dissoudre les deux Chambres et d'exiger la tenue d'élections. suite des élections, les deux Chambres se réunissent afin de se prononcer sur le projet de loi. Le recours à une telle procédure n'a jamais été nécessaire puisqu'à la suite de chacune de ces trois élections, le même parti a été reporté au pouvoir.

En Australie, les modifications à la Constitution sont apportées par voie de référendum, un vote majoritaire étant requis dans quatre des six États, de même qu'une majorité absolue. En général, une proposition modificative est approuvée par les deux Chambres du Parlement avant qu'elle ne soit soumise au suffrage universel. Cependant, une modification peut être proposée par une des deux Chambres, mais si l'autre rejette la proposition, le gouverneur général peut néanmoins exiger la tenue d'un référendum. Certaines propositions, comme celles visant à réduire le nombre de sièges affectés à l'approbation de la majorité des électeurs de cet État qui participent au référendum (article 128 de la Constitution).

Au sein du Sénat, l'influence des partis l'emporte sur la loyauté envers les régions. Les gouvernements des États sont les principaux porte-parole des régions. Par conséquent, le rôle du Sénat en tant que Chambre des États est limité. Il représente effectivement tous les États au même degré, et les États moins nombreux attachent de l'importance à ces pressions auprès des sénateurs de leur État pour qu'ils adoptent des positions particulières sur diverses questions, et les premiers ministres peuvent, dans la limite de leurs attributions, s'opposer à la réélection des sénateurs qui ne répondent pas à ces pressions. Quelques sénateurs réussissent à se faire élire à titre d'indépendants, bien qu'il soit difficile de le faire dans une circonscription aussi vaste qu'un État. C'est beaucoup plus facile pour eux de le faire lorsque les électeurs sont mécontents des partis politiques.

En dépit de ces restrictions, il reste que la confrontation au sein du Sénat est en grande partie une prolongation du conflit entre les partis à la Chambre basse. Toutefois, les lignes de ce conflit au sein du Sénat sont devenues moins claires à la suite de l'introduction de la formule de la représentation proportionnelle pour le Sénat, qui a été votée en 1949. Le parti travailliste a introduit cette formule en vue



les mécanismes démocratiques, et la nécessité de parvenir à un compromis favorise trop souvent le « plus petit commun dénominateur » au détriment d'un gouvernement vigoureux<sup>1</sup>. Une critique que l'on formule à l'égard du Bundesrat en tant que tel est que les corps législatifs des Länder ont peu d'influence sur les positions que leurs ministres adoptent à cette assemblée. Les corps législatifs discutent rarement des questions soumises au Bundesrat. Comme le Bund a accaparé pratiquement toutes les compétences concurrentes, les corps législatifs des Länder n'ont plus grand chose à faire et ils ont un peu de difficultés à recruter de bons candidats. Vu que les ententes fédérales-Länder sur diverses activités à frais partagés sont conclues entre gouvernements, les législatures des Länder ont de la difficulté à y participer même dans les domaines qui demeurent de leur compétence. Certains observateurs ont proposé que tous les partis politiques des législatures des Länder, et non seulement le parti ou la coalition au pouvoir, soient représentés au Bundesrat.

<sup>1</sup> Deux auteurs ont évalué le régime allemand il y a quelque temps. Il s'agit de Gunter Kisker, dans « *Unitarian and Cooperative Federalism: A Changing Concept of Federalism in West Germany?* » et de Gerhard Lehmbruch, dans « *Federalism and the Problem of Party Government in West Germany* ». Ces deux documents ont été présentés à l'atelier sur l'étude comparative du fédéralisme, tenu à l'université Queen's de Kingston, en août 1977.

Vous trouverez des études sur le fonctionnement du Bundesrat, la Chambre haute allemande, dans:

— Nevil, Johnson, *Federalism and Decentralization in the Federal Republic of Germany*, document de recherche n° 1 pour la « U.K. Commission on the Constitution », H.M.S.O., Londres, 1973.

— R. L. Watts, « *Second Chambers in Federal Political Systems*, volume 2, rapports et documents de base, Commission consultative de l'Ontario sur la Confédération, Toronto, 1970.

— R. M. Burns, « *Second Chambers: German Experience and Canadian Needs* », *Canadian Public Administration*, hiver 1975.

— Albert Pfitzer, *The Bundesrat*, Press and Information Office of the Government of the Federal Republic of Germany, 1972.

majorité des deux tiers, y compris au moins la majorité des membres du Bundestag.

6. Le Bundestag participe également à diverses nominations. Il élit la moitié des membres du Tribunal constitutionnel.

7. Une majorité des deux tiers des deux Chambres, votant séparément, est nécessaire pour l'adoption de modifications constitutionnelles.

Aucun Land n'a un droit de veto. Les modifications constitutionnelles sont plus fréquentes qu'au Canada, mais peu nombreuses. En pratique, l'appui des deux principaux partis nationaux est nécessaire.

La majorité des questions nationales en Allemagne sont d'ordre politique et surviennent entre les partis. Ce ne sont pas des questions de conflits entre le gouvernement fédéral et les Länder. Les partis et le Bundestag dominent la vie politique malgré le rôle important du Bundesrat. On peut difficilement surestimer le rôle primordial des partis dont l'action au fédéral et dans les Länder est très intégrée. On y régle bon nombre des différends qui surgissent entre les régions et entre le gouvernement fédéral et les Länder.

Le Bundesrat a bien réussi, au fil des années, à influencer le contenu des mesures législatives fédérales sans avoir, en fin de compte, à rejeter plus qu'un nombre comparativement peu élevé de projets de lois. Cette situation pourrait être en partie due au fait que, depuis l'introduction de la loi fondamentale en 1949, le Bundesrat a presque toujours été contrôlé par le même parti ou la même coalition libérale (SPD-FDP) a pris le pouvoir en 1972, le Bundesrat a été étroitement contrôlé par l'opposition (la coalition conservatrice CDU-CSU), et cela a rendu le rôle du Bundesrat un peu plus controversé. Le contrôle exercé par l'opposition a reposé pendant quelque temps, et de façon partielle, dans le camp des Libéraux, le plus petit des trois partis nationaux qui, même s'il formait un gouvernement de coalition avec les Socialistes à la Chambre basse,

à également formé des coalitions avec les Conservateurs dans deux des gouvernements provinciaux représentés dans le Bundesrat. Toutefois, à la suite d'une récente élection en Basse-Saxe, le gouvernement CDU de ce Land a cessé de dépendre des Libéraux; en conséquence, la coalition CDU-CSU peut maintenant contrôler le Bundesrat sans l'aide des Libéraux.

Si en octobre 1978, le CDU l'emporte sur la coalition SPD-FDP en Hesse (un important Land qui a quatre sièges au Bundesrat), la coalition CDU-CSU contrôlerait les deux tiers (28) des sièges au Bundesrat. Sans la Sarre, la CDU-CSU ne contrôlerait, même avec la Hesse, que 25 des 41 votes du Bundesrat.

Le Bundesrat constitue l'un des facteurs importants parmi un ensemble d'autres facteurs constitutionnels et politiques qui font qu'en Allemagne, le consensus national est essentiel à la mise en œuvre de toute modification constitutionnelle ou législative vraiment importante. Un autre élément important de l'entre en ligne de compte, soit le système modifié de représentation proportionnelle qui est utilisé pour les élections. Comme à Bonn, la plupart des gouvernements des Länder sont des coalitions. Cela facilite certaines alliances de partis au Bundesrat.

Divers observateurs reconnaissent l'efficacité du système allemand, mais celui-ci n'est pas moins l'objet d'un certain nombre de critiques générales: ne cadre pas avec un authentique régime fédéral. De plus, l'importance donnée à la consultation et à la coordination au niveau de l'administration étouffe

# Le régime allemand et le Bundesrat

L'Allemagne a un type particulier de régime fédéral : la majeure partie du pouvoir législatif est exercée par le parlement central, tandis que l'application des lois centrales relève en grande partie des provinces. Une forte coordination institutionnelle est donc indispensable, car l'on peut dire de façon générale que si la spécialité des autorités centrales (le Bund) est la législation, celle des autorités provinciales (les Länder) est l'application des lois. Cette répartition des tâches est donc une des principales raisons d'être du Bundesrat, Chambre haute de la législature fédérale. Les ministres provinciaux qui y siègent votent selon les instructions de leur gouvernement.

Quoque le Bundesrat et l'administration des lois fédérales par les Länder remontent au XIX<sup>e</sup> siècle, la constitution allemande actuelle (la loi fondamentale) date de 1949. Dans l'Allemagne moderne, l'uniformité, plutôt que la diversité, est la règle à cause de la concentration de l'autorité législative au parlement central. Par exemple, les lois et tarifs fiscaux les plus importants sont fixés en vertu d'une loi fédérale et sont les mêmes dans tout le pays. La diversité est possible seulement dans le domaine restreint d'autonomie réservé aux corps législatifs des Länder et, dans une certaine mesure, dans l'administration de la plupart des lois fédérales par les Länder.

Une autre particularité importante du système parlementaire allemand est que les élections ont lieu normalement chaque quatre ans, à intervalle régulier. Les membres de la Chambre basse fédérale sont élus par un système de représentation proportionnelle. Une moitié des membres est élue sur la base des comités et l'autre moitié est choisie par les partis politiques à partir des listes des partis.

Voici les principales dispositions relatives au Bundesrat :

1. Chaque Land détient 3, 4 ou 5 sièges dépendant de sa population. Le chiffre de la population est plus disparate que le nombre de

sièges de sorte que les plus petits Länder ont un nombre de votes relativement plus élevé. Chaque Land doit exprimer son vote en bloc, selon les instructions du gouvernement du Land.

2. Avant qu'une loi fédérale ne soit déposée à la Chambre basse appelée Bundesstag, elle doit être présentée au Bundesrat qui formule une déclaration préliminaire concernant sa position. Cette disposition donne lieu à de nombreuses négociations et ajustements avant l'adoption des lois. Le Bundesrat a six semaines (trois dans des cas urgents) pour formuler sa position.

3. Le Bundesrat peut introduire lui-même des mesures législatives, mais il le fait rarement.

4. Le Bundesrat doit approuver toutes les mesures législatives fédérales ainsi que la plupart des décrets et instruments de réglementation. Il a un droit de veto absolu sur les lois touchant les intérêts et les obligations des Länder ; ces lois, dont certaines sont mentionnées dans la Constitution, représentent la majorité des projets de loi, plus que le nombre escompté à l'origine. Certaines mesures législatives non déterminées touchant les intérêts et les fonctions des Länder sont également assujetties à un droit de veto absolu, et les limites de cette catégorie non déterminées sont établies en dernier lieu par le Tribunal constitutionnel.

5. Le Bundesrat s'oppose rarement à des mesures législatives qui ne touchent pas directement les Länder. S'il le fait, le Bundesstag peut annuler cette opposition. La formule suivie est la suivante : si l'opposition a été adoptée par la majorité des votes du Bundesrat, elle peut être rejetée par une décision de la majorité des membres (c.-à-d. non seulement des membres votants) du Bundesstag. Si le Bundesrat adopte l'opposition par une majorité d'au moins les deux tiers de ses votes, le Bundesstag devra, pour la rejeter, obtenir une

## Conclusion

Le gouvernement se rend compte de l'importance des répercussions probables de la nouvelle Charte sur notre système politique, et il reconnaît que certaines d'entre elles sont difficiles à prévoir. Le projet de loi sur la réforme constitutionnelle a été rédigé de façon détaillée et précise de façon à faciliter l'étude des propositions du gouvernement, et le présent document a été conçu dans l'espoir de promouvoir ce processus de discussion et de réflexion.

gner un rôle majeur dans le processus législatif et politique. On pourrait modifier cet équilibre au besoin, par exemple, en abrégeant ou en prolongeant la période pendant laquelle la sanction des projets de loi du gouvernement peut être retardée, ou encore en diminuant ou en augmentant le nombre de membres que doit choisir la Chambre des communes.

Un dernier point reste à être examiné. Si l'objectif du gouvernement, qui est d'établir une tribune régionale influente, est réalisé, quel en sera l'impact sur le système politique canadien? On ne tentera pas ici de donner une réponse complète ou définitive à une question aussi complexe. On peut tout de même dégager les points suivants avec raisonnablement de certitude.

1. La Chambre de la Fédération aura un plus grand pouvoir politique que le Sénat.
2. Le pouvoir exécutif du gouvernement fédéral et le pouvoir législatif de la Chambre des communes seront modérés par la nécessité de négocier et de faire des compromis avec la seconde Chambre.

3. Les provinces et les régions moins peuplées pourront exercer une influence accrue sur l'ensemble du processus législatif fédéral.
4. Les Canadiens français, malgré leur situation minoritaire au pays, disposeront d'un pouvoir d'action leur accordant une certaine égalité relativement aux projets de loi fédéraux touchant le statut de la langue française.
5. Les conférences fédérales-provinciales continueront de jouer un rôle essentiel pour ce qui est de la coordination des politiques, des programmes et des activités fédéraux et provinciaux. La Chambre de la Fédération, dans la mesure où elle réussira à exercer efficacement sa charge, partagera avec ces conférences la fonction de faire valoir et de concilier les points de vue des régions concernant les politiques et les lois fédérales.
6. En résumé, on aura instauré une tribune régionale qui devrait contribuer largement à renouveler notre régime fédéral.



«récompense» moins attrayante que ne l'est un siège au Sénat. Les sénateurs occupent leur siège durant toute leur vie active, alors que les membres de la Chambre de la Fédération seraient assurés de leur seulement jusqu'aux élections générales suivantes. Il demeure toutefois qu'un parti quelconque, dans une longue période, pourrait compter sur un certain nombre de sièges. En fin de compte, la question est de savoir s'il nommerait à ces sièges des personnes énergiques et de calibre supérieur.

Étant donné que bon nombre des partis fédéraux et provinciaux seront représentés à la Chambre de la Fédération, il semble peu probable que le parti du gouvernement à la Chambre des communes ou le parti formant l'opposition officielle réussisse, seul ou au moyen d'une coalition, à contrôler la seconde Chambre de façon permanente. Ainsi, la Chambre deviendra probablement une tribune où les débats politiques seront animés. Les partis ne gagneront rien à y nommer des «marionnettes» et conséquemment, des personnes de fort calibre y seront vraisemblablement attirées. Bien que les systèmes de «listes de parti» utilisés pour choisir les législateurs puissent permettre le favoritisme jusqu'à un certain point, ils ouvriront également l'accès au processus législatif à des personnes très capables qui ne souhaitent ou ne pourraient peut-être pas y arriver par voie d'une élection. Un tel système permettra également d'intégrer des individus dont les connaissances et l'expérience seraient particulièrement riches. Il est à souhaiter, par exemple, que les assemblées législatives se permettent de nommer à la Chambre de la Fédération des personnes engagées à l'échelon municipal, de sorte que leurs points de vue particuliers seront mis en valeur lors de l'étude des projets de loi fédéraux. La concurrence entre les partis au sein de la nouvelle Chambre sera susceptible de les amener à choisir des personnes dont la compétence et l'expérience seront utiles. Il incombera à chaque assemblée législative, chacune devant répondre de ses actions devant la population, de décider du genre de personnes qu'elles nommeront à la nouvelle Chambre.

À tout prendre, il semble donc que le favoritisme ne jouera pas un rôle aussi important à la seconde Chambre que ne le présument certaines personnes; il semble en outre que des personnes de haut calibre y seront nommées, et que, de façon générale, celles-ci se sentiront mandatées pour utiliser ou menacer d'utiliser le veto suspensif.

Selon certains observateurs, le contraire est à craindre, c'est-à-dire que la nouvelle Chambre nuise continuellement à la Chambre des communes dans ses efforts pour faire adopter des projets de loi utiles. Voilà une question importante que le Comité spécial mixte sur la Constitution, de même que d'autres qui étudient le projet de loi sur la réforme constitutionnelle, voudront sans doute examiner en profondeur. Rappelons toutefois que plusieurs mécanismes servent à protéger la suprématie des Communes.

1. L'effet du veto suspensif pourra être annulé après expiration du délai de soixante jours (bien que les mesures d'une importance linéaire) qui étudient le projet de loi sur la réforme constitutionnelle, y voudront sans doute examiner en profondeur. Rappelons toutefois que plusieurs mécanismes servent à protéger la suprématie des Communes.
2. Certains projets de loi urgents pourront être présentés pour sanction à plus bref délai.
3. Les projets de loi concernant l'affectation de fonds ne pourront être déposés qu'aux Communes.
4. Comme la moitié des membres de la seconde Chambre seront choisis par les Communes, ils risqueront de perdre leur siège après la dissolution du Parlement, laquelle a lieu à une date que détermine habituellement le gouvernement.

Il est évident que le gouvernement, dans les proportions qui font partie du projet de loi sur la réforme constitutionnelle, cherche à établir un certain équilibre entre les deux Chambres. Bien que la Chambre des communes doit nécessairement avoir plus de poids, la seconde Chambre se verra aussi-

pourront exprimer publiquement et sans réserve leurs opinions durant le débat. Ensuite, il ne sera pas facile de rallier les deux tiers des voix aux Communes dans de telles circonstances. Enfin, si en adopter une loi qui irait à l'encontre de l'épanouissement de la langue parlée par une collectivité linguistique francophone (ou anglophone) importante et identifiable, la loi pourrait être contestée en vertu de la Charte des droits et libertés.

Ainsi, la Constitution conférerait d'importants pouvoirs à la nouvelle Chambre. Cependant, on peut en dire autant du Sénat actuel qui possède le droit d'opposer un veto absolu aux mesures législatives des Communes. L'utilisation peu fréquente de ce droit qui leur est conféré en vertu de la Constitution témoigne du fait que les sénateurs considèrent qu'ils ne sont pas vraiment mandatés pour l'exercer. Les membres de la Chambre de la Fédération, choisis de la façon proposée, se considéreront-ils investis d'un mandat pour utiliser (ou menacer d'utiliser) le veto suspensif?

Selon toute probabilité, la réponse est «oui». Il importe de mettre en contraste la méthode de sélection des membres de la nouvelle Chambre et celle qui s'applique aux sénateurs actuels. Ces derniers sont choisis uniquement par le gouvernement en place, le résultat étant que la grande majorité est nommée par un seul parti politique. Par ailleurs, leur nomination est valide jusqu'à la fin de leur vie active, et elle ne fait pas l'objet, au préalable, de discussions publiques. Aux termes des dispositions proposées, les membres de la seconde Chambre seraient choisis par tous les partis politiques fédéraux et provinciaux. D'après les plus récents résultats électoraux, le parti libéral fédéral, à la différence des partis libéraux des provinces, ne nommerait que vingt-quatre des cent dix-huit membres de la nouvelle Chambre (voir l'annexe 4). De plus, les assemblées législatives concernées auraient le droit de rejeter ou d'appuyer le choix des partis. On pourrait alors discuter publiquement du mérite des membres éventuels avant leur nomination à la seconde Cham-

bre. Une autre différence mérite d'être soulignée, à savoir qu'ils seraient nommés pour une période limitée et indéterminée, c'est-à-dire jusqu'aux élections générales suivantes, fédérales ou provinciales. Leur mandat pourrait toutefois être renouvelé dans la mesure où leur parti recueillerait suffisamment de suffrages pour garder des sièges à la seconde Chambre.

La répartition des sièges accordés aux divers partis pourrait changer à l'occasion de chaque élection, mais la proportion des sièges obtenue dans la seconde Chambre changerait probablement moins que leur part de sièges dans leurs législatures respectives. La raison en est que la sélection se fera en proportion des suffrages exprimés, et que normalement la part des suffrages qu'obtiennent les partis ne change pas beaucoup d'une élection à l'autre. Selon un rapport publié dans l'édition du 2 août 1978 du *Globe and Mail* de Toronto, si la seconde Chambre avait existé depuis cinq ans, seulement 12 des 118 sièges auraient été redistribués entre les partis. Ainsi, la représentation des partis au sein de la seconde Chambre sera plus stable qu'au sein des législatures qui en choisissent les membres. Pour cette raison, et parce que ses membres compétents pourront s'attendre à faire renouveler leur mandat, il est peu probable, contrairement à ce que présument certains observateurs, que la composition de la seconde Chambre change radicalement après chaque élection fédérale ou provinciale.

D'après certains observateurs, le seul changement qu'entraînera la création de la nouvelle chambre sera d'accroître le favoritisme: le système de listes utilisé par les partis dans chaque assemblée législative sera, dit-on, appliqué par les partis fédéraux et provinciaux pour récompenser leurs membres en les nommant à la seconde Chambre et en renouvelant leur mandat après chaque élection. Ainsi, poursuivra-t-ils, les partis pourront contrôler les votes de ceux qu'ils auront désignés.

Il faudrait d'abord souligner qu'une nomination à la Chambre de la Fédération représentera une

place décide de présenter le projet de loi pour sanction sans le modifier, il devra se munir d'arguments très valables pour expliquer son refus de faire des concessions.

En outre, il est raisonnable de supposer qu'un organisme élu indirectement, comme celui que le gouvernement propose, aura vraisemblablement plus souvent recours à son droit de veto suspensif qu'il ne le ferait s'il avait le droit de veto absolu, comme d'ailleurs le ferait sans doute le Sénat actuel. La nouvelle Chambre hésiterait à opposer un veto absolu aux projets de loi de la Chambre des communes craignant d'être critiquée par le public pour avoir bloqué les initiatives des Communes, qui est le moins gêné de retarder la sanction de projets de loi lorsque le gouvernement refusera de faire les changements qu'elle aura jugé opportuns.

Bien qu'importante en soi, la question de savoir si le délai associé au droit de veto devrait être plus long que soixante jours n'est que secondaire par rapport au pouvoir de la seconde Chambre de retarder la sanction des projets de loi des Communes. Quelle que soit la durée du délai, le gouvernement se verra obligé de défendre sa position. Et, comme on l'a noté plus haut, le gouvernement pourrait, aux termes du projet de loi sur la réforme constitutionnelle, être forcé d'attendre jusqu'à cent vingt jours avant de pouvoir présenter pour sanction un projet de loi auquel s'oppose la seconde Chambre.

Le pouvoir qu'aura la Chambre de la Fédération de retarder les projets de loi et d'attirer l'attention publique sur ceux-ci au moyen d'un vote négatif entraînera presque certainement des changements majeurs dans la façon dont l'appareil administratif fédéral rédige les projets de loi et dans la manière dont le Parlement les étudie. Présenterment, le gouvernement en place peut habituellement compter sur son contrôle des Communes et sur l'approbation sans grande modification, du moins de leurs principaux éléments. Avec l'instauration de la Chambre de

la Fédération, il ne pourra plus présumer de l'appui, jusqu'à un certain point assuré, du Parlement. La possibilité que le gouvernement fasse fi de plusieurs votes négatifs de la seconde Chambre est minime. Au contraire, le gouvernement, selon toute probabilité, consultera et négociera, par l'entremise des ministres chargés de parraîner les divers projets de loi, avec les membres de la nouvelle Chambre avant même que les projets ne soient rédigés dans leur forme finale ainsi que durant leur étude dans la législature. À cette fin, certains des membres de la Chambre de la Fédération pourraient se réunir en comités. Ceux-ci, de même que d'autres membres individuels, pourraient très bien, avec le gouvernement, recueillir les observations des divers groupes extérieurs qui seraient touchés par les mesures législatives en question.

Tout ce processus au cours duquel on recevra les observations, on consultera, on négociera et on fera des changements, ralentira passablement la rédaction et l'adoption des projets de loi. C'est l'une des conséquences quasi inévitables du partage du pouvoir politique, et le gouvernement estime que cet inconvénient vaut la peine d'être supporté pour que les régions puissent contribuer de façon plus visible et plus étendue au mécanisme législatif fédéral.

La seconde Chambre aura, outre son droit de veto suspensif, d'importants pouvoirs à deux autres égards. D'une part, elle pourra opposer un veto aux nominations à la Cour suprême et aux postes les plus élevés d'autres institutions fédérales désignées. D'autre part, ses membres francophones seront dans une position de force pour défendre la langue française, du moins sur le plan de la législation fédérale. Il est vrai que la Chambre des communes pourrait, par un vote majoritaire des deux tiers, passer outre au refus exprimé par la double majorité. Cette possibilité assure la suprématie ultime de la Chambre des communes, qui est élue au suffrage direct. Il existe toutefois des mécanismes efficaces destinés à empêcher les Communes d'utiliser cette suprématie de façon irresponsable. D'abord, les membres francophones de la seconde Chambre



# Répercussions probables de l'application de ces propositions

Comme la plupart des institutions politiques, il est impossible de prédire de façon précise comment fonctionnera la Chambre de la Fédération. On peut tout de même faire certaines prévisions qui soient raisonnablement bien fondées.

L'objectif que s'est fixé le gouvernement est d'ins-tituer au sein du Parlement canadien une tribune où les points de vue des régions pourront être exprimés librement, tribune qui aura un pouvoir politique important sans pour autant compromettre la su-périorité de la Chambre des communes. Il faudrait d'abord se demander si cet objectif est susceptible d'être atteint et, ensuite, en supposant qu'il le sera, quelles seront les répercussions probables de la nouvelle Chambre sur le système politique canadien.

Pour ce qui est de la première question, elle peut être divisée en trois parties:

- (1) les points de vue régionaux seront-ils ex-primés librement?
- (2) la nouvelle Chambre aura-t-elle un pouvoir politique important en raison
- (a) de ses pouvoirs constitutionnels, et
- (b) du « mandat » et de la qualité de ses membres?
- (3) la Chambre des communes gardera-t-elle sa suprématie et son efficacité?

Si l'on peut répondre à ces questions par un « oui », le gouvernement aura réalisé son objectif.

Les points de vue régionaux seront-ils exprimés librement? On a laissé entendre dans ce document qu'il y a de bonnes chances qu'ils le soient parce que le parti politique au pouvoir et celui de l'opposi-tion officielle auront probablement de la difficulté à former, au sein de la seconde Chambre, une coali-tion permanente avec d'autres partis afin d'y obtenir une majorité destinée principalement à soutenir ou à contester le gouvernement et ce, pour deux raisons. Premièrement, de nombreux partis fédéraux et pro-vinciaux, ayant chacun leur allégeance et leurs objectifs propres, seront représentés à la seconde Chambre. Deuxièmement, les législateurs de la seconde Chambre, n'ayant pas été élus au suffrage direct, hésiteront sans doute à s'opposer, unique-ment pour des raisons partisanses, à la volonté des membres des Communes qui eux ont été élus direc-tement. Si ces suspensions sont exactes, le gouver-nement n'aura pas, tant dans la pratique qu'en vertu de la loi, à rallier la « confiance » de la Chambre de la Fédération. Ainsi, la discipline de parti y sera moins forte qu'aux Communes, et ses membres pourront effectivement faire valoir les points de vue des régions. L'allégeance de parti n'y sera pas absente, mais on peut espérer que son influence sera atté-nuée en raison des considérations susmentionnées.

La Chambre de la Fédération jouira-t-elle de pou-voirs importants en vertu de la Constitution? La réponse à cette question est définitivement « oui », quoique nombre d'observateurs qui ont publié-ment commenté le projet de loi n'aient pas reconnu ce fait. Il s'agit d'une question de première impor-tance parce que, si la réponse était « non », l'objectif du gouvernement tel qu'énoncé ci-dessus ne pour-rait être réalisé, et il serait à toutes fins pratiques inutile d'instaurer une nouvelle Chambre avec les énormes inconvénients que cela comporte.

La principale critique formulée par ceux qui répondent « non » à cette question est que la Cham-bre n'aura droit qu'à un veto suspensif et que son pouvoir ne se limitera qu'à retarder de soixante jours la sanction de mesures législatives. Le gouver-nement estime qu'en principe, on ne devrait pas donner à un organisme qui n'est pas élu directement le droit d'opposer un veto absolu à des projets de loi approuvés par la Chambre des communes. Tou-te-fois, comme certains observateurs l'ont rapidement constaté, cette capacité de retarder la sanction de lois représente effectivement un pouvoir très impor-tant: le retard entraîne par un vote négatif de la seconde Chambre constitue l'une des meilleures façons d'attirer l'attention du public sur la question. Si, à la suite d'un vote de rejet, le gouvernement en

8. Si, durant une session donnée, un projet de loi était présenté à la Chambre de la Fédération en déca des quarante-cinq derniers jours de séance, et qu'elle n'y donnait pas suite durant cette session, le gouvernement ne pourrait pas le présenter pour sanction dans les soixante jours civils qui suivraient le dépôt du projet de loi devant la seconde Chambre. En effet, dans ces cas, le projet de loi « mourrait » au feuilleton à la fin de la session et il devrait être présenté à nouveau aux deux Chambres durant la session suivante.

9. Tout projet de loi urgent qui n'a pas un effet important sur les relations fédérales-provinciales et qui n'est pas d'une importance linguistique spéciale pourrait, sur approbation des deux tiers des voix exprimées à la Chambre au gouverneur général pour sanction et ce, sans avoir été adopté au préalable par la Chambre de la Fédération. Avant que les Communes ne procèdent au vote à cet égard, et malgré le caractère urgent du projet de loi, la seconde Chambre disposerait tout de même d'au moins sept jours pour l'étudier.

10. Les membres de la Chambre de la Fédération lui, sauf, comme c'est actuellement le cas pour les sénateurs, les projets qui concernent l'affectation de fonds publics.

11. Tout comme il le fait actuellement avec les sénateurs, le gouvernement pourrait nommer les membres de la Chambre de la Fédération au Cabinet fédéral. Toutefois, contrairement à la pratique actuelle, les ministres de la seconde Chambre auraient le droit de répondre à des questions et de participer aux débats de la Chambre des communes (sans toutefois pouvoir voter). De même, les ministres membres des Communes auraient le

12. Les nominations à la Cour suprême du Canada seraient soumises à l'approbation de la nouvelle Chambre. Les candidats à cette charge seraient choisis selon le nouveau processus de consultations fédérales-provinciales prévu dans le projet de loi.

13. L'approbation de la seconde Chambre serait également nécessaire pour les nominations aux postes les plus élevés de certains organismes établis par le Parlement, tels les sociétés de la Couronne et les organismes de réglementation. Le Parlement désignerait les- quels de ces organismes seraient assujettis à la nouvelle méthode d'approbation.

14. Les mesures ou dispositions législatives «d'une importance linguistique spéciale» nécessiteraient l'approbation de la «double majorité» des membres de la Chambre de la Fédération, c'est-à-dire la majorité de ses membres francophones ainsi que la majorité de ses membres anglophones. En outre, si une mesure ne réunissait pas les deux majorités requises, le gouvernement ne pourrait pas, après l'expiration du délai de soixante jours, présenter la mesure au gouverneur général pour sanction, comme il pourrait le faire pour les autres mesures législatives. Il devrait d'abord obtenir un second vote favorable de la Chambre des communes, ce vote devant réunir les deux tiers des voix exprimées. Il a été noté dans le paragraphe n° 9 ci-dessus qu'aucune mesure d'une importance linguistique spéciale ne pourrait être considérée comme étant un projet de loi urgent. Ainsi, il serait impossible d'adopter une mesure de ce genre sans qu'elle ne soit soumise au vote de la «double majorité» de la

Chambre de la Fédération.



# Propositions du projet de loi sur la réforme constitutionnelle

Voici les principales propositions relatives à la Chambre de la Fédération que contient le projet de loi.

1. Le Sénat actuel serait aboli. (Bien qu'il ne soit pas prévu dans le projet de loi de compenser les sénateurs pour la perte de leur fonction, le Premier ministre a indiqué qu'une commission spéciale serait mise sur pied afin d'étudier la question et de faire des recommandations.)
2. Une Chambre de la Fédération, comportant 118 sièges, serait instituée. Les sièges seraient répartis partiellement en fonction des quatre régions traditionnelles du Sépat et partiellement en fonction du principe voulant que les provinces moins peuplées aient droit à plus de sièges. Alors que les provinces de l'Ontario et du Québec garderaient le même nombre de sièges, soit 24 chacune, la région de l'Atlantique en aurait deux de plus, soit un total de 32 (ces deux sièges étant attribués à Terre-Neuve), et la région de l'Ouest aurait douze sièges de plus, soit un total de 36 (la Colombie-Britannique et l'Alberta en auraient quatre de plus chacune, la Saskatchewan et le Manitoba, deux de plus chacune). Pour ce qui est des deux territoires, ils conserveraient un siège chacun. La répartition actuelle des sièges et celle qui est proposée sont indiquées dans le tableau ci-joint (annexe 3).
3. Pour chaque province, la moitié de ses représentants à la seconde Chambre serait choisie par la Chambre des communes après les élections générales fédérales, et l'autre moitié par les assemblées législatives de la province après les élections générales provinciales. Dans les deux cas, la répartition des sièges serait effectuée, dans la mesure du possible, en fonction des votes obtenus dans la province à l'élection en question et ayant fait élire au moins un député. Quant aux membres des territoires, ils seraient choisis par le gouverneur général en conseil après chaque élection.
4. Conformément à la longue tradition parlementaire canadienne, les membres de la seconde Chambre ne pourraient pas être députés fédéraux ou provinciaux.
5. Il ne serait pas nécessaire que le gouvernement en place ait la «confiance» de la Chambre de la Fédération pour demeurer au pouvoir.
6. Le droit de veto de la seconde chambre n'aurait qu'un effet «suspensif», c'est-à-dire qu'au moins soixante jours après le rejet par la Chambre de la Fédération d'un projet de loi adopté par les Communes, le gouvernement aurait négocié de se prononcer sur un projet de loi. Toutefois, dans les deux cas, à l'expiration du délai de soixante jours, le gouvernement ne dispose que d'une période de temps limitée durant laquelle il doit choisir cette option.
7. Il pourrait donc s'écouler jusqu'à cent vingt jours entre l'adoption d'un projet de loi par les Communes et le moment où le gouvernement pourrait le présenter pour la sanction, malgré les objections de la Chambre de la Fédération. Cette situation se produirait si la Chambre de la Fédération attendait jusqu'au soixantième jour après avoir reçu le projet de loi avant de le soumettre au vote, et si ce vote était négatif, le gouvernement devant attendre soixante autres jours avant de le présenter pour sanction.

c'est-à-dire une majorité des voix exprimées par les membres francophones et une majorité des voix exprimées par les membres anglophones.

Il importe de noter une chose: bien qu'un bon nombre et peut-être la plupart des membres francophones viendront de la province de Québec (tout comme quelques-uns des membres anglophones), certains francophones viendront également d'autres provinces. Le mode de scrutin que l'on propose ne donne donc pas un «statut spécial» aux représentants de la province de Québec. Il aiderait à protéger la langue des Canadiens d'expression française dans toutes les provinces.

élevé que ne le justifie la représentation proportionnelle de leur population. Les mêmes préoccupations veulent donc que la deuxième Chambre veuille à protéger les intérêts spéciaux d'une minorité linguistique, en lui accordant, pour certains projets de loi, une proportion de voix supérieure à sa part de la population totale. La protection de la langue officielle minoritaire et la protection des intérêts des régions les moins peuplées sont toutes deux, aux yeux du gouvernement, essentielles au bon fonctionnement de la fédération canadienne. Le gouvernement a donc inclus dans le projet de loi l'exigence selon laquelle les mesures ayant une importance linguistique spéciale devront être approuvées par une «double majorité» de la nouvelle Chambre,

## Répartition des sièges entre les provinces

Il a été mentionné au début du présent document que le trait marquant d'une deuxième Chambre dans un régime fédéral est que, pour assurer une participation suffisante de toutes les régions au processus législatif central, il faut surreprésenter les parties constituantes les moins populeuses (c'est-à-dire que leur part des sièges doit être supérieure à leur part de la population totale). Dans le Sénat canadien actuel, la répartition des sièges entre les provinces et régions a assez peu d'importance, compte tenu du peu de pouvoirs politiques qu'exerce actuellement cette assemblée. Dans une nouvelle Chambre haute où les membres exigeraient—et ce serait leur devoir de le faire—d'exercer plus de pouvoirs politiques, la question du partage des sièges prendrait plus d'importance.

Une des caractéristiques les plus importantes et les plus constantes de la Fédération canadienne est la tension qui existe entre les provinces «éloignées» de l'Atlantique et de l'Ouest, d'une part, et les provinces «centrales» de l'Ontario et du Québec, d'autre part. Cette tension a un effet sur les débats publics qui entourent de nombreuses politiques importantes, comme les tarifs douaniers, les tarifs de transport des marchandises et le développement industriel. Vue dans l'optique générale de l'histoire du Canada, elle se compare à la tension qui existe entre les groupes linguistiques du Canada. Comme le premier ministre Blakeney de la Saskatchewan l'a dit récemment, l'«ennemi» des producteurs de grain de l'Ouest est bien plus le financier de la rue Bay et de la rue Saint-Jacques que la communauté francophone du Québec. Pour employer les termes du premier ministre Lévesque, les scorpions de l'Est, de l'Ouest et du centre ont réussi à se développer remarquablement bien dans la même bouteille canadienne. Toutefois, les tensions entre les régions se sont amplifiées récemment, et le siège du pouvoir s'est déplacé, à tel point que les institutions centrales du Canada devraient prendre ces changements en considération. On peut évidemment émettre l'hypothèse que, si le Sénat avait fonctionné de la façon

prévue à l'origine, on aurait pu s'accommoder mieux de cette tension.

Quoi qu'il en soit, le gouvernement canadien estime que la répartition des sièges dans une nouvelle Chambre haute devrait, tout en maintenant la parité historique entre l'Ontario et le Québec, donner une plus grande part à l'Ouest. Pour ce qui est de la région de l'Atlantique, il faudrait donner des sièges additionnels à Terre-Neuve afin de rétablir plus fidèlement la répartition de la population entre les quatre provinces qui composent cette région.

## Le mécanisme de la «double majorité» pour les mesures d'ordre linguistique

Le deuxième point qui a été mentionné plus haut est la protection de la position du français au Canada. Les Canadiens français craignent de devenir une minorité de plus en plus faible au Canada, et dans le projet de loi sur la réforme constitutionnelle, sérieusement menacée. Le gouvernement a stipulé donc que la survie de leurs langue et culture est dans l'ensemble de l'Amérique du Nord; ils estiment que la survie de leurs langue et culture est dans le cadre de l'énoncé des objectifs de la Fédération canadienne, «un engagement permanent à l'entente canadienne». Plusieurs dispositions de la Charte des droits et libertés qui est proposée aideraient à garantir la réalisation de cet objectif, mais elles ne pourraient seules garantir la protection du français contre certaines actions qui tout en n'allant pas à l'encontre d'aucune de ces dispositions, pourraient néanmoins être dommageables.

Comme il a déjà été mentionné dans le présent document, le rôle d'une deuxième Chambre fédérale est de protéger les intérêts régionaux des provinces les moins populeuses dans le processus législatif courant, en leur accordant un nombre de voix plus



vinciaux, qui jouissent d'un appui important dans une région devraient être représentés; par conséquent, les assemblées législatives fédérales et provinciales devraient toutes deux choisir les membres de la deuxième Chambre.

3. La Chambre des communes devrait conserver sa suprématie afin que le principe d'un gouvernement parlementaire responsable soit préservé.

—La Chambre des communes—par l'entremise du gouvernement au pouvoir qui doit lui rendre compte de la conduite de ses affaires—devrait être obligée de négocier avec les membres des partis représentés à la deuxième Chambre et d'en arriver à des compromis avec eux; cependant, elle devrait être habilitée à imposer sa volonté, en dernier ressort, sur toute question donnée. Elle devra toutefois payer politiquement toute tentative de le faire sans motif valable aux yeux des électeurs.

## Application des conditions aux divers modes possibles de sélection des membres

On a fait valoir qu'un système d'élection au suffrage direct ne remplirait pas la troisième condition; il ne remplirait pas non plus la première condition, parce qu'un groupe élu au suffrage direct pourrait, comme cela semble être le cas au Sénat australien, être dominé par une lutte des partis fédéraux en vue d'obtenir le contrôle. Cette situation pourrait se présenter même si l'on faisait participer les partis provinciaux, en tenant des élections pour la deuxième Chambre en même temps que les élections générales. Ainsi, une élection au suffrage direct risquerait de ne pas atteindre le principal objectif qui est celui d'une tribune où les points de vue régionaux peuvent être exprimés librement.

Une deuxième Chambre de type Bundesrat ne remplirait pas la deuxième condition qui est celle de la représentation de groupes régionaux divers. Si l'on met sur pied une tribune pour l'expression des points de vue régionaux, il semble normal que les partis politiques autres que le parti au pouvoir dans la province soient eux aussi représentés. C'est une chose particulièrement souhaitable au Canada, parce que le système de scrutin à un tour qui prévaut au pays et qui s'applique à toutes les élections provinciales peut entraîner la constitution d'un gouvernement qui ne représente qu'une minorité des électeurs. Un Bundesrat ne réussirait pas à assurer un agencement assez complet de représentants régionaux et, en plus, il menacerait la suprématie de la Chambre des communes, à moins que ses pouvoirs ne soient sensiblement moindres que ceux du Bundesrat allemand.

Un système d'élection au suffrage indirect remplirait plus facilement les trois conditions énumérées. La Chambre de la Fédération étaient suffisamment nombreux et représentatifs, aucun parti seul n'aurait pu dominer la Chambre; on devrait donc pouvoir assurer à la Chambre des communes, dont les membres sont élus au suffrage collectif, la volonté de la Chambre des communes, qu'ils chercheraient sans cesse à contredire. Ce sont ces considérations qui ont amené le gouvernement à exposer dans le projet de loi sur la réforme constitutionnelle les caractéristiques que, selon lui, la nouvelle Chambre devrait avoir. Avant de donner un résumé de ces caractéristiques, il convient d'insister sur le fait que le partage des sièges entre les provinces et le mécanisme de vote à «double majorité» proposé pour l'approbation des mesures ayant une importance linguistique spéciale.

# Choix d'une des options

Le premier point sur lequel il faut se prononcer est le mode de sélection des membres de la deuxième Chambre, parce que c'est lui qui déterminera dans une grande mesure quel pouvoir législatif donner à la Chambre et, de ce fait, quel pouvoir politique elle pourra exercer. En sachant assez bien quels pouvoirs et quelle autorité lui seront confiés, on peut aborder plus facilement l'importante question de la répartition des sièges entre les régions.

Parmi les cinq modes de sélection des membres, ceux qui méritent d'être examinés attentivement sont ceux du Bundesrat, de l'élection au suffrage direct et de l'élection au suffrage indirect. On n'a pas envisagé la possibilité de formes hybrides, parce qu'elles présenteraient de sérieuses difficultés pour la Chambre et pour l'application du processus de sélection, dans tout système où les membres ne seraient pas en totalité ou en grande majorité choisis de la même façon. Par exemple, si l'on optait pour une combinaison de membres élus au suffrage direct et de membres nommés, des comparaisons désobligeantes seraient sans doute faites entre les «mandats» de chaque catégorie de membres.

## Conditions régissant le choix d'une nouvelle Chambre haute

Le gouvernement a révélé, dans le projet de loi sur la réforme constitutionnelle, qu'il préférerait la cinquième option, soit l'élection au suffrage indirect, parce qu'il croit que ce mode remplit mieux toutes les conditions qui, selon lui, sont essentielles au choix d'une nouvelle Chambre haute, soit:

1. La deuxième Chambre devrait constituer une tribune où les points de vue régionaux puissent être exprimés librement.

—Les membres ne devraient pas être astreints à la discipline de parti qui vaut pour les membres de la Chambre des communes. Cette liberté relative (et non absolue) face aux contraintes de la discipline et parti serait possible

seulement si le gouvernement n'était pas tenu, par la loi ou par les exigences pratiques de la politique, d'avoir la confiance de la deuxième Chambre pour subsister. La Constitution pourrait stipuler de façon explicite que le gouvernement n'est pas formellement tenu d'avoir la confiance de la deuxième Chambre, et les droits de veto de cette dernière pourraient être limités en conséquence; toutefois, en dépit de ces dispositions de la Constitution, on pourrait se retrouver dans une situation où la deuxième Chambre serait en mesure d'entraver à plusieurs reprises les projets de loi du gouvernement. La meilleure façon de prévenir cette situation serait de prendre les arrangements nécessaires pour qu'aucun des partis politiques fédéraux ne puisse s'attendre à détenir à quelque moment que ce soit une majorité des sièges, ni à contrôler une majorité permanente en coalition avec d'autres partis. Par conséquent, il faudrait concevoir la Chambre de la Fédération de manière à ce que les groupes des partis soient tous comparativement nombreux et à ce qu'ils tendent à s'associer différemment suivant les questions à l'étude; les alliances changeraient continuellement. De ce fait, le gouvernement au pouvoir à la Chambre des communes ne devrait s'attendre ni à contrôler la nouvelle Chambre, ni à se trouver face à une majorité hostile et immuable, vouée avant tout à entraver son programme politique.

2. Les points de vue régionaux exprimés à la deuxième Chambre devraient refléter l'avis du plus grand nombre possible de groupes représentatifs.

—Cela signifie en pratique que tous les partis politiques, fédéraux comme provinciaux, devraient être représentés.



Si le mandat des membres prenait fin aux élections provinciales suivantes, la Chambre de la Fédération ressemblerait fort au Bundesrat. Cependant, leur mandat pourrait être d'une durée fixe, supérieure à la durée du gouvernement provincial; ils pourraient ainsi un peu plus d'indépendance. Il y aurait cependant un problème: advenant un changement de gouvernement pendant le mandat des membres, le nouveau gouvernement ne les considérerait plus comme étant vraiment représentatifs.

Une autre difficulté que présente une deuxième Chambre où seuls les partis du gouvernement sont représentés est que, dans le cadre d'un système de scrutin à un tour, un gouvernement peut avoir une majorité des sièges à l'assemblée législative, mais ne représenter qu'une minorité d'électeurs. Bien que le système électoral puisse aider à accroître les chances des gouvernements d'obtenir une majorité des sièges à l'assemblée législative—et certains jugent que cette particularité aide notre régime de gouvernement parlementaire—on peut toutefois monter une opposition assez sérieuse contre l'utilisation des résultats divergents du système électoral comme base d'une autre élection au «suffrage indirect» de membres pour la deuxième Chambre.

Il est évident que le fait de limiter l'admission au parti du gouvernement présente des difficultés. D'autre part, les avantages d'inclure les partis de l'opposition sont tout aussi évidents. Plus il y a de partis représentés à la deuxième Chambre, plus faibles sont les chances du gouvernement fédéral en place ou de l'opposition officielle de la contrôler, de telle sorte que la discipline de parti devrait jouer un rôle mineur et, de ce fait, les points de vue régionaux pourraient être exprimés plus librement. Si tous les partis de l'opposition aussi bien que les partis du gouvernement étaient représentés, les débats seraient probablement plus vigoureux, et la

confrontation ainsi que la conciliation de points de vue différents se ferait sans doute plus ouvertement. Par exemple, si la représentation se limitait aux partis des gouvernements provinciaux, il est fort probable qu'un plus grand nombre d'ententes et d'arrangements se concluraient à huis clos plutôt que dans l'enceinte de la Chambre de la Fédération, un peu comme ils sont actuellement conclus entre les gouvernements à l'occasion des nombreuses conférences fédérales-provinciales et entre-temps.

Un autre avantage qu'il y a à permettre la représentation d'un plus grand nombre de partis est que les scissions ou hostilités entre les régions pourraient être atténuées grâce à la formation, suivant les différentes questions à l'étude, d'alliances toutes nouvelles entre les partis, sans égard pour les frontières régionales. La Chambre des communes remplit déjà une telle fonction d'intégration, mais, comme il a déjà été mentionné, dans les limites des contraintes de la discipline de parti qui doit être assez stricte pour permettre le fonctionnement d'un système parlementaire.

Si l'on considère que les membres de la deuxième Chambre ne devraient pas provenir seulement du parti au pouvoir à l'assemblée législative, on doit aussi prévoir, par convention ou par règle écrite, la façon dont les membres seront choisis dans d'autres partis. Il a déjà été mentionné que les résultats divergents de notre système de scrutin à un tour ne devraient pas être utilisés comme base d'une autre élection au «suffrage indirect». Par conséquent, on ne devrait pas fonder la répartition des sièges à la deuxième Chambre sur le nombre de sièges qu'a obtenu chaque parti à l'assemblée législative, mais plutôt sur la proportion des suffrages exprimés que chaque parti a recueillie à la dernière élection générale.

électoral assez fort pour leur permettre de défilier à maintes reprises et dans une optique partisane les membres de la Chambre basse qui eux sont élus au suffrage direct.

Les principales questions qui viennent à l'esprit dans le cas d'un régime de suffrage indirect sont les suivantes:

- Les membres de la deuxième Chambre devraient-ils être élus par l'assemblée législative fédérale ou les assemblées provinciales, ou par les deux?

• Les membres devraient-ils être élus à la majorité des voix de l'assemblée législative (et, de ce fait, ils pourraient provenir surtout du parti au pouvoir)? Ou devraient-ils être choisis de manière à refléter la proportion des sièges que détient chaque parti à l'assemblée législative? Ou devraient-ils être choisis de manière à refléter la proportion des votes remportée par chaque parti représenté à l'assemblée législative?

Première question—Certains prétendent qu'à défaut d'une élection au suffrage direct par les électeurs d'une province, c'est l'institution qui représente seule la province, c'est-à-dire l'assemblée législative provinciale, qui devrait élire ses représentants. Ceci correspond à ce qui se pratique autrefois aux États-Unis et en Suisse, et à ce qui se pratique actuellement en Inde. Par contre, on pourrait faire valoir que l'assemblée législative provinciale est élue seulement pour adopter des lois dans des secteurs de compétence provinciale; que l'électorat d'un scrutin provincial ne devrait pas être appelé à prendre en considération une nouvelle dimension complexe, à savoir comment les députés provinciaux pourraient choisir les membres de la deuxième Chambre fédérale. On prétend en outre qu'il n'y a pas de raison valable pour que les représentants élus indirectement par les assemblées législatives provinciales «surveillent» l'exercice des pouvoirs fédéraux par les députés aux Communes

qui sont élus au suffrage direct (sauf peut-être pour ce qui a trait à l'exercice du pouvoir de dépense fédéral dans des secteurs de compétence provinciale). Par conséquent, si les membres de la deuxième Chambre doivent être élus au suffrage indirect, ils devraient être élus par la Chambre des communes qui, tout comme les assemblées législatives provinciales, est constituée de membres qui représentent des circonscriptions et intérêts locaux et régionaux, mais qui ont été élus pour jouer un rôle dans les affaires fédérales.

Evidemment, il y a de bons arguments pour et contre. La solution la meilleure est peut-être de reconnaître que les législateurs fédéraux et provinciaux représentent tous des intérêts régionaux, bien que leurs perspectives soient différentes. Il s'ensuit que les assemblées législatives fédérale et provinciales, ainsi que les partis politiques devraient tous participer à la sélection des membres de la deuxième Chambre.

Deuxième question: façon de représenter à la Chambre de la Fédération les divers partis politiques qui sont présents aux assemblées législatives fédérale et provinciales. Si les partis du gouvernement étaient seuls représentés et si, disons, la moitié des membres de la deuxième Chambre provenaient du parti du gouvernement fédéral en place, ce gouvernement pourrait très bien contrôler la Chambre de la Fédération en tout temps, ce qui réduit les possibilités de créer une tribune où les points de vue régionaux puissent être exprimés librement. Si, en dépit des arguments énoncés au paragraphe précédent, on décidait d'exclure les membres élus par la Chambre des communes et de limiter l'admission aux personnes représentant les partis des gouvernements provinciaux, on se retrouverait avec une assemblée fort semblable au Bundesrat, sauf que les membres ne seraient pas des ministres provinciaux. On a déjà avancé assez d'arguments dans le présent document pour démontrer qu'une deuxième Chambre de type Bundesrat ne conviendrait probablement pas au Canada.

risquerait beaucoup plus de paralyser le régime de cette façon que si l'on avait recours au changement moins radical que suppose la dernière solution: l'élection au suffrage «indirect».

## Cinquième option: élection au suffrage indirect

Les membres de la deuxième Chambre pourraient être élus au suffrage «indirect», c'est-à-dire sélectionnés par voie d'élections à deux degrés: les électeurs élisent d'abord les législateurs (députés fédéraux ou provinciaux), qui à leur tour élisent les membres de la deuxième Chambre.

On s'est servi du suffrage indirect pour le Sénat américain jusqu'en 1913; c'étaient les assemblées législatives des Etats qui élisaient les sénateurs fédéraux. En Suisse, la méthode de sélection des représentants d'un canton à la deuxième Chambre dépend de la loi cantonale et, jusqu'à tout récemment, quelques assemblées législatives cantonales élisaient encore leurs représentants au suffrage «indirect». Maintenant, tous les cantons suisses ont recouru au suffrage «direct». Les régimes politiques américain et suisse sont tous deux fondés, comme il a déjà été mentionné, sur le partage des pouvoirs entre l'exécutif et le législatif, et la transition du suffrage indirect au suffrage direct a pu se faire dans ces pays avec moins d'inquiétude que dans un régime parlementaire. En Inde, où le régime est parlementaire et où la constitution date d'après la Seconde Guerre mondiale, les membres de la seconde Chambre fédérale sont élus au suffrage indirect par les assemblées législatives des Etats, à l'exception de quelques membres qui sont choisis par le Président de l'Inde.

Une critique que l'on peut formuler à l'égard du suffrage indirect est qu'il est moins démocratique que le suffrage direct. D'autre part, l'avantage qu'il présente pour un régime parlementaire réside dans le fait que les membres de la Chambre haute ainsi élus sont moins portés à croire qu'ils ont un mandat

question de dosage de l'autonomie législative qu'il faut accorder aux cantons. Toutefois, il est évidemment plus facile d'établir une tribune régionale efficace dans un régime congressional et dans un régime où les élections se tiennent à intervalles réguliers: les sénateurs peuvent se prononcer et voter de façon relativement indépendante sans craindre de miner la position du gouvernement ou d'entraîner sa chute.

L'exemple le plus valable pour les Canadiens est celui de l'Australie, parce que le régime de ce pays est lui aussi parlementaire; toutefois les résultats demeurent en général décevants. Le Sénat australien (qui est élu au suffrage direct) a été, dans l'ensemble, moins une tribune pour l'expression et la conciliation des intérêts régionaux qu'une extension du conflit entre les partis à la Chambre basse. Ainsi, la discipline de parti tend à étouffer, au Sénat comme à la Chambre basse, l'expression des intérêts régionaux. Lorsque le Sénat a aidé à déclencher l'élection qui a entraîné la chute de l'administration Whitlam, en 1975, un des résultats a été l'intensification de la controverse qui entoure depuis longtemps le rôle du Sénat en Australie.

On pourrait peut-être adapter le modèle australien aux conditions canadiennes en y apportant quelques changements. Ainsi, on pourrait donner à la deuxième Chambre canadienne moins de pouvoirs. On pourrait également essayer d'arranger les choses pour que la deuxième Chambre soit moins dominée par la lutte entre les partis fédéraux, notamment en faisant élire les membres à l'occasion des élections générales dans leur province, afin de faire participer les partis provinciaux autant ou plus que les partis fédéraux. Toutefois, malgré les précautions, toute forme de sénat élu au suffrage direct va certainement soulever des questions, à savoir si le gouvernement devrait avoir la confiance non seulement d'une Chambre, mais des deux et, par conséquent, s'il est capable d'agir efficacement. La tentative pourrait réussir, mais elle pourrait aussi échouer, en raison de certaines incertitudes. On





centrales sont appliquées non pas par le gouvernement central, mais par les provinces. Une forte coordination institutionnelle est donc indispensable car l'on peut dire de façon générale que si la spécialité des autorités centrales est la législation, celle des autorités provinciales est l'application des lois. Cette répartition des tâches est donc une des principales raisons d'être du Bundesrat.

De plus, il y a deux caractéristiques du régime fédéral allemand qui, comparées au régime canadien, peuvent faciliter le bon fonctionnement du Bundesrat, dans un esprit de compromis. La première est l'absence en Allemagne de certains facteurs canadiens qui peuvent créer des relations interrégionales tendues. Ainsi, l'écart que nous retrouvons au Canada entre le centre et la périphérie (par exemple, en ce qui a trait aux tarifs douaniers et aux tarifs de transport des marchandises), entre les provinces pauvres et les provinces riches, entre les provinces pourvues de ressources et les provinces dépourvues, ainsi qu'entre les groupes linguistiques, est plus marqué qu'en Allemagne.

La deuxième caractéristique du régime allemand est l'intégration plus poussée des partis politiques fédéraux et provinciaux. La plupart des problèmes politiques importants se résument à des problèmes de parti plutôt qu'à des problèmes interrégionaux ou fédéraux-provinciaux. Ces deux dernières catégories de problèmes sont habituellement résolues, d'abord au sein des partis politiques, puis entre eux. Il en résulte une plus grande cohésion régionale du système, puisque le débat se déroule dans un contexte où l'attention nationale est centrée sur les institutions nationales, notamment sur la Chambre basse de l'assemblée fédérale, mais aussi, depuis quelque temps, sur le Bundesrat, puisqu'il participe de plus en plus à la lutte nationale des partis pour la suprématie.

Certains Canadiens prétendent que la création au Canada d'une institution équivalant au Bundesrat aiderait à réaliser l'intégration des partis politiques fédéraux et provinciaux, et à rendre les gouverne-

ment pas réussirait pas période limitée; néanmoins, on ne réussirait pas nécessairement à regrouper dans la deuxième Chambre des membres qui feraient figure de véritables représentants de leur région. Par exemple, au moment d'un changement de gouvernement, les sénateurs nommés par l'ancien gouvernement pourraient être accusés de n'être plus représentatifs. Par ailleurs, même si l'on comptait des représentants de plus d'un parti fédéral ou provincial, vu les changements de gouvernement, il serait difficile d'obtenir un « agencement » assez complet de représentants régionaux provenant des partis secondaires aussi bien que principaux.

### Troisième option: un « Bundesrat »

Cette option entraînerait un changement radical et, comme elle a suscité beaucoup d'intérêt dans certains milieux, il convient de l'examiner à fond ici. Un « Bundesrat » est une deuxième Chambre composée de ministres provinciaux qui votent sur instruction de leur gouvernement et non pas seulement de personnes mises en candidature ou nommées par les gouvernements provinciaux, comme dans le cas de la première et de la deuxième option mentionnées plus haut.

L'idée d'une tribune régionale de type « Bundesrat » plait à certains gens, parce que cette institution a sans conteste bien fonctionné en Allemagne; on prétend qu'un organisme semblable au Canada entraînerait une meilleure coordination des activités des gouvernements fédéral et provinciaux, ainsi qu'une meilleure intégration de leurs politiques. Il est à noter, toutefois, qu'il y a plusieurs raisons pour lesquelles cette institution convient particulièrement bien au régime fédéral allemand et pourquoi elle pourrait ne pas fonctionner aussi bien au Canada.

L'Allemagne a un type particulier de régime fédéral. La majeure partie du pouvoir législatif étant exercée par le parlement central, il en résulte donc une grande uniformité des programmes publics dans tout le pays. De plus, une bonne partie des lois



Il y a trois principaux choix à faire relativement à la création d'une nouvelle tribune régionale:

• le mode de sélection des membres;

• la détermination des pouvoirs de la nouvelle

Chambre;

• le partage des sièges entre les provinces du

Canada.

## Mode de sélection des membres

Le principal problème est peut-être le mode de

sélection des membres, étant donné qu'il déterminera dans une grande mesure les pouvoirs politiques dont les membres disposeront et les pouvoirs qu'ils pourront effectivement exercer. Le Sénat actuel a des pouvoirs législatifs presque identiques (sauf pour ce qui a trait aux projets de loi financiers) à ceux de la Chambre des communes, mais les sénateurs estiment qu'ils ne peuvent les exercer vraiment que dans de rares occasions. Il existe plusieurs alternatives au système de nomination actuel. Les principales sont les suivantes:

Première option:

Un Sénat composé de membres nommés pour une période indéterminée (jusqu'à la retraite) et choisis par le gouvernement fédéral parmi un groupe de candidats proposés par les gouvernements provinciaux (le Comité spécial mixte sur la Constitution a recommandé en 1972 que la moitié des membres du Sénat soient nommés de cette façon).

Deuxième option:

Un Sénat composé de membres nommés pour une période déterminée par les gouvernements fédéral et provinciaux.

Troisième option:

Un Sénat composé de ministres provinciaux, semblable au « Bundesrat » allemand

où les suffrages d'une province sont exprimés en bloc par chaque gouvernement provincial (voir l'annexe 1).

Quatrième option:

Un Sénat composé de membres élus au suffrage universel direct, comme cela se fait aux États-Unis, en Suisse et en Australie (voir l'annexe 2).

Cinquième option:

Un Sénat composé de membres élus par provinciales, ou par les deux (soit un Sénat élu au « suffrage indirect »).

## Première option: un Sénat composé de membres choisis parmi les candidats des gouvernements provinciaux et nommés à vie par le gouvernement fédéral

De l'avis du gouvernement du Canada, il est peu probable que ce système change sensiblement le rôle de la deuxième Chambre. Il pourrait certes y avoir une certaine amélioration, en ce sens que la représentation des partis au Sénat serait alors probablement plus variée, mais elle pourrait l'être encore plus si l'on confiait la sélection aux assemblées législatives provinciales (voir la cinquième option décrite plus loin). La principale difficulté serait que les sénateurs nommés à vie (ou du moins jusqu'à leur retraite) ne se sentiraient pas en mesure de jouer un rôle régional plus efficace, sur le plan politique, que les sénateurs actuels. Ce point sera abordé plus longuement plus tard.

## Deuxième option: un Sénat composé de membres nommés pour une période déterminée par les gouvernements fédéral et provinciaux

Cette solution nécessiterait plus d'un changement puisque les sénateurs seraient nommés pour une

plication des partis représentant chacun une province ou une région différente, de telle sorte que le rôle d'intégration que jouent actuellement les principaux partis fédéraux, dont l'influence s'étend à tout le pays, se perdrait. Une telle situation serait admissible dans une deuxième Chambre à laquelle le gouvernement n'aurait pas à répondre, mais elle le serait difficilement à la Chambre des communes.

Les autres fédérations ont toutes jugé nécessaire d'avoir une deuxième Chambre, et il semble bien que le Canada devrait lui aussi suivre cette voie. Comme toute, il s'agit de concevoir une deuxième Chambre

qui soit non seulement politiquement efficace en tant que tribune régionale, mais qui soit aussi compatible avec notre régime de gouvernement parlementaire. Autrement dit, la nouvelle Chambre haute devrait avoir assez de pouvoirs politiques pour défendre efficacement les intérêts régionaux, mais elle ne devrait pas miner la suprématie de la Chambre des communes, sinon, le système actuel, dans lequel le gouvernement est appelé à rendre compte à une Chambre élue au suffrage direct, deviendrait impraticable. Les sections suivantes du présent document traiteront d'ailleurs des diverses options possibles à la lumière des critères qui viennent d'être énoncés.

c'est pourquoi la tâche d'assurer la discussion publique et la conciliation des différents régionaux portait sur les politiques nationales revient de plus en plus au processus de négociation fédérale-provinciale ou à ce que l'on appelle le «fédéralisme exécutif».

Cependant, le fédéralisme exécutif présente un certain nombre d'inconvénients. Les pouvoirs exécutifs sont renforcés par rapport aux pouvoirs législatifs alors que l'inverse pourrait être nécessaire. Les conférences se déroulent souvent à huis clos et, souvent, elles ne réussissent pas à établir un consensus ou même à produire un résultat bien défini, ce qui donne l'impression d'un désaccord perpétuel entre les gouvernements, et peut aussi exagérer l'impression de division qui règne dans l'ensemble du pays. Enfin, les institutions gouvernementales fédérales, n'offrant pas de tribune valable pour les régions, perdent de leur pouvoir politique par rapport aux gouvernements provinciaux. Il s'ensuit donc que certaines des tendances centrifuges qui se sont toujours manifestées dans la fédération canadienne, et qui affaiblissent notre sentiment d'unité, se trouvent renforcées.

Certains ont prétendu qu'en modifiant le fonctionnement de la Chambre des communes, on pourrait en faire une tribune où les points de vue régionaux seraient exprimés plus librement et peut-être en arriver ainsi à se passer d'une deuxième Chambre. On a suggéré, par exemple, qu'il serait possible d'assouplir la discipline de parti de deux façons, afin de permettre aux députés de défendre plus facilement en public les intérêts de leur propre région ou province. On pourrait, d'une part, davantage permettre un scrutin libre, c'est-à-dire un scrutin non contrôlé par les whips des partis. Il suffirait, d'autre part, de prévoir qu'une perte de confiance dans le gouvernement puisse être manifestée seulement par voie d'un scrutin organisé précisément à cette fin, permettant ainsi aux députés du parti au pouvoir de voter à l'occasion contre le gouvernement sur des mesures qu'ils jugent néfastes pour leur région. On a également proposé de modifier le régime de scrutin à un tour de manière à remédier à certains de ses

Le gouvernement a examiné ces suggestions et reconnaît que leur mise en œuvre pourrait avoir certains résultats bénéfiques, mais qu'elle pourrait aussi créer certains problèmes inacceptables. Mentionnons que la conversion de notre système électoral en un système de représentation proportionnelle changerait sensiblement le fonctionnement de notre régime de partis et de notre régime parlementaire. On pourrait assister à une multiplication des partis, et à une succession de gouvernements de coalition.

effets négatifs sur la représentation provinciale à la Chambre des communes. Actuellement, les partis politiques peuvent remporter dans les différentes provinces une proportion de sièges très différente de la proportion des suffrages qu'ils ont obtenue; il en résulte que le public identifie ainsi les partis à certaines provinces ou régions plus qu'il ne le devrait, ce qui risque de désavantager le gouvernement en place. De même, la répartition actuelle des sièges ne rend pas justice à l'appui que le Parti libéral a recueilli dans l'Ouest ni à celui que le Parti conservateur a reçu au Québec. Il arrive parfois dans une élection que le parti du gouvernement ne réussisse pas à faire élire un seul député dans une province donnée, ce qui signifie habituellement que Cabinet.

Cependant, la principale difficulté est qu'il semble douteux que de tels changements permettent d'atteindre l'objectif visé, soit de disposer d'une tribune régionale efficace. Par exemple, il y a probablement peu de possibilités dans notre régime de gouvernement de tenir des scrutins libres sur des questions de politique importantes qui touchent les régions. La plupart des lois fédérales ont différents effets sur les régions, de telle sorte que, si l'on essayait de soustraire la totalité ou la majorité de ces lois à l'esprit de parti, on affaiblirait sensiblement la raison d'être de parti, on affaiblirait sensiblement la raison d'être de l'organisation et des activités des partis. En outre, un nouveau système électoral pourrait changer la représentation aux Communes, mais il ne ferait pas en soi disparaître le besoin d'une discipline de parti; on pourrait alors assister à une multi-

Chambre des communes, à un second examen réflé-chi et modéré. On a donc mis sur pied une deuxième Chambre, le Sénat. On comptait protéger les régions moins peuplées en répartissant les sièges du Sénat entre les «régions du Sénat», et assurer un second examen valable en faisant nommer les sénateurs à vie par le gouverneur général en conseil. Cependant, les premiers sénateurs devaient, dans la mesure du possible, être choisis parmi les mem-bres des conseils législatifs de chaque province. Les gouvernements provinciaux se chargeaient des nominations et devaient veiller à ce que les deux partis politiques soient représentés dans une pro-portion équitable.)

En 1867, les sièges au Sénat étaient répartis selon trois régions (l'Ontario, le Québec et les Maritimes); en 1915, soit au moment de la dernière grande répartition des sièges du Sénat, il y avait quatre régions sénatoriales, l'Ouest étant la nouvelle. Chaque région réunissait vingt-quatre sièges. Cependant, la région de l'Atlantique compte trente sièges depuis 1949, soit six de plus que les autres régions: ce sont les sièges qui ont été accordés à Terre-Neuve au moment de son entrée dans la Con-fédération. De plus, on a ajouté un siège pour chacun des territoires.

Au moment de la Confédération, il y a eu de longs débats sur la composition du Sénat canadien; ces débats furent un élément clé dans la mise sur pied de notre régime fédéral actuel. Par exemple, le fait que le Québec se voyait attribuer au Sénat autant de sièges que l'Ontario, dont la population était plus nombreuse, lui fit accepter plus facilement les dispo-sitions fédérales à la population, une représentation proportionnelle à la population, une représentation des communes.

Les débats qui se sont tenus au moment de la Confédération au sujet du Sénat étaient enflammés, parce que l'on s'attendait à ce que le Sénat soit une institution puissante sur le plan politique. En fait, son importance ne s'est pas mesurée au cours des ans aux attentes des Pères de la Confédération. Le fait

Le Sénat a joué un rôle très utile en tant que Chambre de «réflexion»: il a amélioré la qualité de la législation en examinant soigneusement le libellé des projets de loi, et ses comités ont fait un bon travail d'enquête. Cependant, ses membres ne sont pas perçus par le public comme étant des défenseurs acharnés des intérêts régionaux, et leur influence en tant que représentants régionaux sur ce que l'on pourrait appeler le contenu politique de la législation fédérale a été relativement faible. Le Sénat a donc eu plus de succès en tant que Cham-bre de «réflexion» qu'en tant que tribune régionale. Or, dans la plupart des pays, qu'ils soient fédéraux ou unitaires, on a eu tendance à faire moins de cas du rôle de réflexion, alors que, dans les fédérations, le rôle de tribune régionale demeure dans l'ensem-bles toujours aussi important. Au Canada, on peut même dire qu'une tribune régionale efficace s'avère être un besoin pressant.

## Autres tribunes de conciliation des diffé-rends régionaux

Les intérêts régionaux sont bien entendu défen-dus et conciliés au sein du Cabinet et des caucus pour des questions de solidarité du Cabinet et des parlementaires de la Chambre des communes, mais, pour des questions de sollicité du Cabinet et des caucus, ce processus se déroule à huis clos. En public, les députés feront habituellement passer la défense des intérêts régionaux après leur responsa-bilité première qui est d'appuyer ou d'opposer le gouvernement en place. Ni le Sénat ni la Chambre n'est donc une tribune régionale tout à fait libre, et



## Raisons pour lesquelles il faudrait remplacer le Sénat

Le gouvernement estime qu'il est nécessaire de remplacer le Sénat parce que le pays et le Parlement ont besoin d'une deuxième Chambre qui puisse fournir une tribune régionale efficace sur le plan politique, c'est-à-dire une tribune où des intérêts régionaux différents et concurrents puissent être exposés librement, faire l'objet de débats et, si possible, être conciliés par des personnes que les régions reconnaissent comme leurs représentants.

Pourquoi le Sénat actuel ne joue-t-il pas ce rôle? Pourquoi a-t-on besoin d'une telle tribune maintenant? La Chambre des communes ne pourrait-elle pas satisfaire ce besoin mieux qu'une nouvelle Chambre haute? Avant de répondre à ces questions, il convient d'examiner les arguments en faveur d'une assemblée législative «bicamérale», puis l'évolution du Sénat depuis 1867.

### Arguments en faveur d'une assemblée législative «bicamérale»

Les institutions centrales d'une fédération comprennent habituellement une assemblée législative bicamérale, c'est-à-dire composée de deux Chambres. Les membres d'une des Chambres sont élus suivant le principe de la représentation proportionnelle à la population; les membres de l'autre représentent habituellement les parties ou régions constituantes en nombres égaux ou presque égaux. Depuis que la confédération des États-Unis est devenue une fédération en 1789, on se sert d'un tel système, lorsqu'une fédération est constituée, pour garantir aux régions les moins peuplées qu'elles ne seront pas entièrement assujetties aux décisions prises par la majorité de la population. Ainsi rassurées, elles peuvent accepter que soient confiées aux autorités centrales assez de pouvoirs pour atteindre des buts communs.

La volonté de soumettre les lois émanant de la «Chambre basse» à un second examen réfléchi et modéré justifie également l'existence d'une «Chambre haute», tant dans les pays fédérés que dans les pays unitaires. La pratique courante a été de sélectionner

tionner les membres de la Chambre haute d'une façon plus «conservatrice» que les membres de la Chambre basse, afin d'assurer une plus grande stabilité et, de l'avis de certains, une sagesse plus grande que ne le permettrait une sélection purement démocratique. La volonté inaltérée de la majorité inspirait—comme elle le fait encore souvent—de la méfiance, non seulement aux régions moins peuplées d'une fédération, mais aussi à ceux qui craignent les démagogues, les leaders charismatiques et, naturellement, les pressions que l'on peut exercer sur le gouvernement au pouvoir pour l'inciter à agir de façon hâtive, peu réfléchie et peu conspecte.

Le mode de sélection des membres de la deuxième Chambre a beaucoup varié d'un pays à l'autre. Par exemple, l'hérédité et le lignage (comme en Grande-Bretagne), la propriété et l'âge, ont servi de critère. Selon les pays, les membres de la deuxième Chambre ont été nommés par la Couronne, par le président ou par le gouvernement ou encore élus par un groupe de personnes (par exemple, par les membres d'une assemblée législative). On accorde souvent aux membres de la Chambre haute un mandat plus long qu'aux membres de la Chambre basse, afin de leur assurer plus d'indépendance et de créer une plus grande stabilité. Il arrive que plusieurs de ces particularités se présentent simultanément. Aux États-Unis, par exemple, les sénateurs étaient autrefois élus au «suffrage indirect», c'est-à-dire par les assemblées législatives des États; l'âge minimal était et est toujours plus élevé pour les sénateurs que pour les membres de la Chambre des représentants; en outre, les sénateurs avaient et ont toujours un mandat plus long que les membres de la Chambre basse.

### Création et évolution du Sénat canadien

Au moment de la Confédération, on a souscrit aux deux principaux arguments en faveur d'un parlement bicaméral; ces arguments étaient qu'il fallait protéger les régions moins peuplées et soumettre les projets de loi de la Chambre basse, soit de la





Le 20 juin 1978, le gouvernement déposait devant la Chambre des communes le projet de loi sur la

réforme constitutionnelle. Ce projet de loi renferme des dispositions qui prévoient le remplacement du Sénat actuel par une Chambre de la Fédération. Bien qu'un certain nombre d'articles importants de l'Acte de l'Amérique du Nord britannique ne puissent être modifiés que par le Parlement du Royaume-Uni, le Parlement du Canada a, suite à un amendement à la Constitution canadienne adopté en 1949 sur l'initiative du premier ministre de l'époque, le très honorable Louis Saint-Laurent, le pouvoir de modifier de son propre chef certains articles de la Constitution canadienne. Parmi ces articles trouvent ceux qui ont trait à la deuxième Chambre

Depuis le 20 juin, on a dit tour à tour que ces dispositions étaient audacieuses, sans importance, l'essence du projet de loi n'étant que simple ratio-stage, dangereuses, bien équilibrées, impraticables, ingénieuses, et ainsi de suite. Évidemment, les options sont bien partagées lorsqu'il s'agit de déterminer si le Sénat devrait être aboli, quel type de deuxième Chambre (s'il en est) devrait le remplacer et comment la nouvelle Chambre de la Fédération proposée par le gouvernement fonctionnerait dans la pratique.

Dans le présent document, le gouvernement tente d'exposer son point de vue sur la question du remplacement du Sénat: pourquoi il estime nécessaire de créer une nouvelle Chambre haute qui soit sensiblement différente du Sénat actuel; pourquoi l'élection au suffrage universel direct pourrait créer des

difficultés dans notre régime parlementaire; pourquoi la nomination des membres par les divers paliers de gouvernement ne donnerait pas d'aussi bons résultats que la sélection, par les assemblées législatives, de membres représentant tous les partis politiques, et pourquoi toutes les assemblées législatives, provinciales comme fédérale, devraient participer à la sélection des membres. Le document étudie aussi certaines questions liées aux nouvelles propositions, à savoir pourquoi il devrait y avoir un mode de scrutin spécial pour protéger la position du français au Canada et de quelle façon la nouvelle Chambre de la Fédération serait susceptible d'influer sur le processus législatif.

Nous avons tenté, en expliquant le choix que le gouvernement a fait parmi les diverses options possibles et en essayant de prévoir les répercussions de la nouvelle Chambre, de prendre en considération certaines des questions qui ont été soulevées depuis la publication des propositions. Le gouvernement reconnaît qu'il n'y a pas de solution parfaite au problème de la réorganisation des institutions gouvernementales. Toute solution doit nécessairement être le fruit d'un compromis entre plusieurs objectifs parfois concurrents.

Les solutions que propose le gouvernement sont les meilleures qu'il puisse concevoir. Toutefois, il invite les gens à en discuter et à lui soumettre leurs commentaires. Il est à souhaiter que le présent document favorisera une discussion des problèmes et fera progresser le processus par lequel on pourra enfin en arriver à un choix judicieux de nouveaux arrangements constitutionnels, dans le cadre du renouvellement du régime fédéral canadien.



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L'honorable Marc Lalonde  
Ministre d'État chargé des  
Relations fédérales-provinciales  
Août 1978



# **La réforme constitutionnelle**

## **La Chambre de la Fédération**

L'honorable Marc Lalonde  
Ministre d'Etat chargé des  
Relations fédérales-provinciales

Gouvernement  
du Canada  
Government  
of Canada



# CONSTITUTIONAL REFORM

## AN OVERVIEW OF RECENT INITIATIVES IN THE AREA OF CONSTITUTIONAL REFORM.

### INTRODUCTION

A written constitution is rarely easily changed. Normally, it provides for an amending formula combining elements of rigidity to protect its basic principles and elements of flexibility to provide for change when needed.

The British North America Act of 1867, which is the written part of the Constitution of Canada, did not provide for an amending formula. The search for such began as early as 1927 and has proven to be as complex a matter as the question of substantive change itself.

Amending the Canadian Constitution is the topic of much current debate and reflection. You will find here a selection of documents presenting some of the more recent initiatives for constitutional reform. The documents are in chronological order, starting with a discussion of the period of constitutional review from 1968 to 1971 and ending with the recent federal position paper on official language minority rights.

### SELECTED DOCUMENTS

1. **Government of Canada Constitutional Review 1968-1971**, document prepared by the Canadian Unity Information Office, December 1977.
- ✓ 2. **Constitutional Conference Proceedings**, Victoria, British Columbia, 14 June 1971.
- ✓ 3. **The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Summary of Recommendations**, Queen's Printer, Ottawa, 1972.
- ✓ 4. **Background notes on the Patriation of the British North America Act**, Government of Canada document, 1976.
- ✓ 5. **Letters from the Prime Minister to the Premiers of the Provinces** concerning "Patriation" of the BNA Act with attachments, 31 March 1976.
- ✓ 6. **Premier of Alberta's letter to Prime Minister Trudeau**, 14 October 1976, in reply to the letter of 31 March 1976.
- ✓ 7. **Prime Minister's letter to the Premier of Alberta**, 19 January 1977, in reply to the letter of 14 October 1976.
- ✓ 8. **Prime Minister's Letter to the Premier of Quebec**, 2 September 1977, concerning official language minority education rights.

- ✓ 9. **Premier of Quebec's letter to Prime Minister**, 9 September 1977, in reply to letter of 2 September 1977.
10. **Prime Minister's letters to the Premiers Moores, Campbell, Regan, Hatfield, Davis, Schreyer, Blakeney, Lougheed and Bennett**, 6 October 1977, concerning official language minority education rights.
11. **Prime Minister's letter to the Premier of Quebec** in reply to letter of 9 September 1977 and Position of the Federal Government on Quebec's Bill 101, 6 October 1977.

The list of suggested readings, included to provide the reader with a handy source of reference, should he/she wish to further pursue the subject, gives a sampling of proposals from the private sector, some government proposals given prior to the Victoria Conference, and a joint statement by the Leader of the Opposition, Joe Clark, and the Progressive Conservative Premiers.

### SUGGESTED READINGS

1. "Constitutional Reform in Canada", in **Canadian Federalism: Myth or Reality**, J.P. Meekison, ed., Methuen Publishing, Second Edition, Toronto, 1971, pages 235-252.
2. **La crise constitutionnelle canadienne**, by Gérard Beaudoin, in *Le Devoir*, 20-22 August 1977.
3. Faribault, Marcel, **La révision constitutionnelle, premiers fondements**, éditions Fides, Montreal, 1970.
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5. ✓ **La Constitution canadienne et son avenir**, by Jean de Grandpré, in *Le Devoir*, 19 September 1977.
6. Smiley, D.V., **Canada in Question**, Chapter 2, McGraw-Hill, Toronto, 1972.
7. **Une nouvelle Constitution pour le Canada**, by Robert Décaray, in *Le Devoir*, 7-9 September 1977.
8. **Pour un Canada qui serait la somme de ses parties**, by Robert Décaray, in *Le Droit*, 27 September 1977.
9. Black, E.R., **Divided Loyalties**, McGill-Queen's University Press, Montreal and London, 1975, pages 114-119.

The documents contained in this kit are taken from various sources and do not necessarily reflect the Government of Canada's point of view

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10. **The Constitution and the People of Canada**, by Pierre E. Trudeau, Prime Minister, Government of Canada, Ottawa, 1969.
11. **The Constitutional Review 1968-1971**, Secretary's Report, Canadian Intergovernmental Conference Secretariat, 1974.
12. Pearson, L.B., **Federalism for the Future**, Queen's Printer, Ottawa, 1968.
- \*13. **A joint statement by Opposition Leader Joe Clark and Progressive Conservative Premiers**, Kingston, Ontario, 16 September 1977.

\* Available upon request from the Canadian Unity Information Office.



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Please note the following additions to Documentation  
Kit #202 - Constitutional Reform:

SELECTED DOCUMENTS

Add:

- \* 12. Trudeau, Pierre E., A Time for Action - High-  
lights of the Federal Government's Proposals  
for the Renewal of the Canadian Federation,  
House of Commons, Ottawa, 12 June 1978.
- \* 13. Office of the Prime Minister, Highlights of the  
Constitutional Amendment Bill 1978, House of  
Commons, Ottawa, 20 June 1978.
- \* 14. Government of Canada, The Constitutional Amend-  
ment Bill, 1978 - Explanatory Document, House of  
Commons, Ottawa, 20 June 1978.

SUGGESTED READINGS

Add:

- \*\* 13. Trudeau, Pierre E., A Time for Action - Toward  
the Renewal of the Canadian Federation, House of  
Commons, Ottawa, 12 June 1978.
- \*\* 14. Government of Canada, The Constitutional Amend-  
ment Bill - Text and Explanatory Notes, House of  
Commons, Ottawa, 20 June 1978.
- \*\* 15. Transcripts of the Prime Minister's Press Confer-  
ences, Ottawa, 12 and 20 June 1978.
- \*\* 16. Progressive Conservative Party, Discussion Paper  
No. 3, The Constitution and National Unity, Ottawa,  
April 1978.

- \* ATTACHED
- \*\* Available upon request from the Canadian Unity  
Information Office.

July 1978

- \*\* 17. Strayer, B.L., Q.C., Outline for an Address to Canada Unity/Canada Uni, Vancouver, 14 January 1978.
- 18. First Report of the Advisory Committee on Confederation, submitted to William Davis, Premier of Ontario, Toronto, 5 April 1978.
- \*\* 19. Beaudoin, Gérald, "New Paths for Canadian federalism - Make it to Measure," in Report, May 1978.

\*\* Available upon request from the Canadian Unity Information Office.

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# Highlights of the Constitutional Amendment Bill 1978



Office of  
The Prime Minister

Cabinet du  
Premier Ministre



## PRIME MINISTER INTRODUCES BILL TO AMEND CANADIAN CONSTITUTION

Prime Minister Trudeau has introduced a bill in the House of Commons to implement proposed changes in the Constitution of Canada, as promised in last week's policy paper entitled A Time for Action.

Constitutional reform is to be carried out in two phases: Phase I will cover matters under federal jurisdiction and Phase II will cover areas in which co-operation and consent of the provinces are required.

"It is not the intention of the Government to ask Parliament to pass the bill at its current session," the Prime Minister said. "The intention is to refer the subject matter of the bill to a joint committee of the Commons and Senate, and for the Government to have intensive discussions with the provinces, including a conference of First Ministers expected to take place in the fall.

"Thus, the purpose of the bill is to serve as a basis for public, parliamentary and intergovernmental discussion in the months ahead. The Government feels that by putting forward its proposals in detailed, legislative form the process of public examination can be more sharply focussed and the timetable for final passage expedited".

In the bill, the Government sets out in legislative detail how it plans to proceed with such major changes as replacement of the present Senate by a House of the Federation; reorganization of the Supreme Court of Canada; the establishment of a Charter of Rights and Freedoms; improved mechanisms for consultation with the provinces; a constitutional definition of the role of the Prime Minister and Cabinet, and strengthening of the office of Governor General.



The proposed new Constitution also, for the first time, would contain a Preamble and Statement of Aims, defining the principles of nationhood and the national goals of Canadians.

Following are highlights of the main elements in the proposed Constitutional Amendment Act 1978:

#### House of the Federation

- The Western Provinces and the Atlantic Region would have greater representation than they do in the present Senate. Quebec and Ontario would each retain their present 24 members in the Upper House. Western representation would increase to 36 from the present 24; the Atlantic region would have 32 seats, up from 30.
- Total membership in the House of the Federation would be 118. Of these, 58 would be selected by the federal Government and 58 by the provinces.
- All major political parties would be represented in the new House, on the basis of popular vote in each province. The federal government would appoint members after each federal election, while the representatives of the provinces would be named after provincial elections.
- The House of the Federation would have power to delay legislation passed by the Commons, and would be able to initiate legislation of its own, except for money bills.
- The new House would be asked to approve appointments to the Supreme Court and to some Crown agencies.
- A special provision to safeguard language rights would require that any measure deemed to have "linguistic significance" be passed by a majority of English-speaking and a majority of French-speaking members of the new House.

### The Supreme Court

- The bill would expand the number of judges from nine to 11. There would be four from the Quebec Bar rather than the present three. Of the remaining seven positions there would have to be at least one from each of four regions: the Atlantic, Ontario, the Prairies and British Columbia.
- The provinces would be consulted before judges are appointed. In the absence of agreement, appointments would be made by a nominating council. All appointments would be subject to approval by the House of the Federation.
- On matters concerning Quebec civil law, only the judges from Quebec would make rulings.

### Federal-provincial relations

- An annual meeting of First Ministers would become a constitutional requirement (enshrining in law what has become current practice).
- The federal government would consult the provinces before appointing lieutenant-governors.
- Certain federal payments to the provinces may be made constitutionally binding, thus protecting them from sudden and arbitrary termination.
- The federal government would consult with the provinces before invoking its seldom-used "declaratory power", under which it may bring any work or project under federal jurisdiction.

### Office of the Governor General

- The Governor General would exercise prerogatives, functions and authority in his own right, as Canadian head of state. However, the Queen would remain as always the sovereign head of Canada, and exercise her full powers when in Canada.

### The Council of State

- The present Privy Council would become the Council of State, a title which reflects more clearly its function.

### The Federal Cabinet

- For the first time, the functions of the Prime Minister and Cabinet would be spelled out in the Constitution, recognizing them as vital elements in the system of government.

### Charter of Rights and Freedoms

- The proposed charter would be binding on the federal government, Parliament and all federal institutions as soon as it becomes law. It would become binding on the provinces as and when they see fit to "opt in". Joint action by federal and provincial governments would be required to have the charter entrenched and beyond the power of any single government to change unilaterally.
- Among rights proposed in the bill are freedom of movement within Canada, and freedom from discrimination by reason of race, ethnic origin, color, religion, sex, language or age.
- Citizens belonging to an official language minority would have the right to choose the minority language for education of their children, where the number of children warrants the provision of minority language schools.
- Identifiable English-speaking and French-speaking communities anywhere in Canada would be protected from reduction of existing rights and practices.
- Persons giving evidence would have the right to use French or English before the Supreme Court or any federal court; before the courts of Quebec, Ontario and New Brunswick, and in any court dealing with a criminal matter or an offence under a provincial law that might result in imprisonment.

The proposed legislation would also add a new section to the Constitution, reaffirming the red and white maple leaf flag as the flag of Canada, O Canada as the national anthem, and God Save the Queen as the royal anthem. Canada's motto "A mari usque ad mare" (From sea to sea) would also be written into the Constitution.

The Prime Minister reaffirmed the Government's intention to have the first phase of the constitutional amendment process completed by July 1, 1979, and the second phase by 1981.

Copies of the publication "The Constitutional Amendment Bill, 1978, Explanatory Document", which provides more detailed information on this bill, may be obtained by writing to:

Canadian Unity Information Office  
P.O. Box 1986  
Station B  
Ottawa, Ontario  
K1P 6G6

Centre d'information sur  
l'unité canadienne  
C.P. 1986  
Station B  
Ottawa (Ontario)  
K1P 6G6

Vous pouvez obtenir des exemplaires de la publication  
"Le projet de loi de 1978 sur la réforme constitutionnelle,  
Document explicatif", qui donne des précisions sur ce projet  
de loi, en écrivant au:



Le projet de loi prévoit également l'adjonction à la Constitution d'un article qui reconnaîtrait le drapeau rouge et blanc à feuille d'érable comme étant le drapeau du Canada, l'O Canada comme étant l'hymne national et le God Save the Queen comme étant l'hymne royal. La devise du Canada, "A mari usque ad mare" (D'une mer à l'autre), serait également consacrée dans la Constitution.

Le Premier ministre a réitéré l'intention du Gouvernement de compléter la première phase de la réforme constitutionnelle avant le 1er juillet 1979 et la deuxième, avant 1981.

- Dès son adoption, la charte proposée était le gouvernement fédéral, le Parlement et toutes les institutions fédérales. Quant aux provinces, elles ne se trouvaient liées qu'au moment où elles décideraient d'y adhérer. L'incorporation de la charte dans la Constitution nécessiterait l'accord des gouvernements fédéral et provinciaux, et aucun de ces gouvernements ne pourrait par la suite la modifier unilatéralement.

- Parmi les droits mentionnés dans le projet de loi se trouvent la liberté de résider et de travailler là où l'on veut au Canada et le droit d'être protégé contre toute discrimination fondée sur la race, l'origine ethnique, la couleur, la religion, le sexe, la langue ou l'âge.

- Les citoyens faisant partie d'une minorité d'une des langues officielles auraient le droit de faire éduquer leurs enfants dans cette langue là où le nombre des enfants justifierait l'ouverture d'écoles pour dispenser l'enseignement dans cette langue.

- Les collectivités francophones et anglophones du Canada seraient protégées contre toute restriction quant à leurs coutumes et à leurs droits acquis.

- Tout témoin assigné devant la Cour suprême ou toute autre cour fédérale, devant les cours du Québec, de l'Ontario et du Nouveau-Brunswick, ainsi que devant toute cour qui entendrait une cause criminelle, ou une cause tombant sous le coup d'une loi provinciale et pouvant entraîner une peine d'emprisonnement, aurait le droit d'utiliser le français ou l'anglais pour son témoignage.

- La Constitution rendrait obligatoires certains paiements du gouvernement fédéral aux provinces, protégeant ainsi ces dernières contre une cessation soudaine ou arbitraire.

- Le gouvernement fédéral consulterait les provinces avant d'invoquer son "pouvoir déclaratoire", dont il se sert rarement d'ailleurs, et en vertu duquel il peut faire relever du Parlement fédéral toute activité et tout projet.

#### La Charge du Gouverneur Général

- Le Gouverneur Général aurait des prérogatives, fonctions et pouvoirs qui lui seraient propres et qu'il exercerait à titre de chef d'Etat canadien. Toutefois, la Reine resterait la souveraine du Canada et elle exercerait ses pleins pouvoirs lorsqu'en territoire canadien.

#### Le Conseil d'Etat

- Le Conseil privé deviendrait le Conseil d'Etat; ce titre correspond mieux à ses fonctions.

#### Le Cabinet fédéral

- Pour la première fois, les fonctions du Premier ministre et du Cabinet seraient précisées dans la Constitution; ainsi, elles seraient reconnues comme des éléments essentiels du régime de gouvernement.

- La nouvelle Chambre serait appelée à approuver les nominations à la Cour suprême et à certains organismes de la Couronne.

- Une disposition spéciale visant à protéger les droits linguistiques exigerait que toute mesure adoptée par la majorité des membres anglophones et la majorité des membres francophones de la nouvelle Chambre.

#### La Cour suprême

- Aux termes du projet de loi, le nombre des juges passerait de neuf à onze. Il y aurait désormais quatre au lieu de trois membres du Barreau du Québec, et pour remplir les sept autres postes, il y aurait au moins une personne de chacune des quatre autres régions (Atlantique, Ontario, Prairies et Colombie-Britannique).

- On consulterait les provinces avant de nommer les juges. A défaut d'une entente, les nominations seraient confiées à un comité chargé de recommander un candidat. La Chambre de la Fédération serait appelée à approuver toutes les nominations.

- Seuls les juges du Québec se prononceraient sur les questions de droit civil québécois.

#### Les relations fédérales-provinciales

- La rencontre annuelle des premiers ministres deviendrait une exigence constitutionnelle (ce serait prévoir en loi ce qui est devenu une pratique courante).

- Le gouvernement fédéral consulterait les provinces avant de nommer les lieutenants-gouverneurs.

La nouvelle Constitution renfermerait également, pour la première fois, un préambule et une déclaration d'objectifs où seraient définis les principes régissant notre existence nationale et les objectifs de la nation.

Voici les grandes lignes des principales réformes proposées dans le projet de loi de 1978 sur la réforme constitutionnelle.

#### La Chambre de la Fédération

- Les provinces de l'Ouest et de l'Atlantique y auraient plus de représentants qu'elles en ont au Sénat dans sa forme actuelle. Le Québec et l'Ontario garderaient chacune leurs 24 membres. Le nombre des représentants des provinces de l'Ouest passerait de 24 à 36, et celui des représentants des provinces de l'Atlantique, de 30 à 32.

- Le nombre total des membres de la Chambre de la Fédération serait de 118. Le gouvernement fédéral en choisirait 58, les provinces, 58 et les deux territoires, un chacun.

- Tous les principaux partis politiques seraient représentés au sein de la nouvelle Chambre: le nombre des représentants de chacun serait fonction des suffrages exprimés aux élections dans chaque province. Le gouvernement fédéral effectuerait ses nominations après chaque élection fédérale, tandis que les provinces effectueraient les leurs après les élections provinciales.

- La Chambre de la Fédération aurait le pouvoir de retarder l'application des lois adoptées par la Chambre des communes et de proposer elle-même des lois, sauf des lois ayant des implications financières.



LE PREMIER MINISTRE PRÉSENTE UN PROJET DE  
LOI VISANT À MODIFIER LA CONSTITUTION CANADIENNE

Le Premier ministre a présenté à la Chambre des communes un projet de loi visant à faire adopter les modifications constitutionnelles annoncées dans le document intitulé Le Temps d'agir, qu'il a récemment rendu public.

La réforme constitutionnelle sera effectuée en deux phases: la première phase portera sur les questions qui relèvent de la compétence du gouvernement fédéral et la seconde sur celles qui requièrent le consentement et la coopération des provinces.

Le Premier ministre a dit que le Gouvernement n'avait pas l'intention de demander au Parlement d'adopter le projet de loi au cours de la présente session, mais plutôt de le soumettre à un comité conjoint de la Chambre des communes et du Sénat, et d'engager des discussions de fond avec les provinces, notamment à l'occasion de la conférence des premiers ministres prévue pour l'automne prochain.

Ainsi, le projet de loi servira de document de base dans les débats publics, parlementaires et intergouvernementaux des prochains mois. Le Gouvernement estime qu'en présentant ses propositions sous forme de projet de loi détaillé, le débat public s'en trouvera mieux orienté et le processus d'adoption accéléré.

Dans le projet de loi, le Gouvernement expose en détail comment il entend opérer des changements aussi importants que le remplacement du Sénat actuel par une Chambre de la Fédération, la réorganisation de la Cour suprême du Canada, l'adoption d'une charte des droits et libertés, l'amélioration des mécanismes de consultation avec les provinces, la définition constitutionnelle du rôle du Premier ministre et du Cabinet et le raffermissement des fonctions du Gouverneur Général.



# **Sommaire du projet de loi sur la réforme constitutionnelle 1978**



Cabinet du  
Premier Ministre

Office of  
The Prime Minister

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Government  
Publications

GOVERNMENT OF CANADA  
CONSTITUTIONAL REVIEW  
1968-1971

DOCUMENT PREPARED BY THE CANADIAN UNITY INFORMATION OFFICE

DECEMBER 1977





GOVERNMENT OF CANADA CONSTITUTIONAL REVIEW  
1968-1971

Review of the Canadian Constitution has been carried out several times since Confederation in an effort to adapt the Constitution to the changing needs of the Canadian people. The most intensive period of review can be said to have had two beginnings, both of which occurred in 1966. On one hand there was a call from some provincial premiers for a basic review of constitutional arrangements. Then, in the summer of that year, there was a federal decision to create a steering committee which would undertake the studies required to build a federal constitutional policy. At that time, the federal government decided that it would not wish to proceed with federal-provincial constitutional discussions for perhaps another two years.

In January of 1967, Premier Robarts of Ontario announced by way of the Speech from the Throne the intention of his government to invite the First Ministers of all provinces and the federal government to a conference where the future course of the Canadian federal system of government might be discussed.

While preparations for the Confederation of Tomorrow Conference were going forward in Toronto, in Ottawa the federal government was also pursuing the matter of constitutional review and stated that the provinces should continue discussions among themselves. As a result, the Confederation of Tomorrow Conference operated on a strictly inter-provincial basis. The Conference, held the 27-30 of November, 1967, generated new interest in constitutional reform and a commitment on behalf of the provinces for more involvement in the constitutional process.

In the federal arena, Prime Minister Pearson's first elaboration of his plans was sent to the provinces in August, 1967. His letter outlined the basic considerations regarding a constitutional bill of rights which would cover political, legal, egalitarian, economic and linguistic rights, and suggested that a federal-provincial conference for discussion on this subject might be held in January or February of 1968.

This first meeting of the Constitutional Conference, 5-7 February, 1968, established the framework for many of the future discussions on constitutional reform. In summary, this first Constitutional Conference dealt with such topics as the entrenchment of a Bill of rights in the Constitution, the question of official languages, regional disparities and the distribution of powers. As well, the mechanisms of constitutional review were established with a proposal adopted for the setting up of a continuing Constitutional Conference.

During the next three years, the Constitutional Conference attempted to formulate proposals in all major areas of constitutional reform. The Canadian Constitutional Charter of 1971 reflected the great deal of consensus achieved in many important areas such as political and language rights, the appointment of judges and an amending formula.<sup>1</sup>

There were, however, other federal government proposals on which consensus was not reached. These are included here to illustrate the variety of topics dealt with during this period:

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<sup>1</sup> See Document #9, Constitutional Conference Proceedings, Victoria, BC, 1971

## The Senate

Being one of the seven main areas for study cited by the First Ministers at the initial Conference in February, 1968, the Senate was examined and proposals for reform were drawn up. The main proposals were that the provinces should play a greater role in the appointment of senators, that the distribution of Senate membership should reflect in an equitable manner the provinces and regions of Canada, and that the Senate should gain new responsibilities including approval of the appointment of judges of the Supreme Court.

## Taxing Powers

It was at the second Constitutional Conference in February, 1969, that the First Ministers agreed to study the distribution of powers as a priority and directed the Continuing Committee of Officials to give its immediate attention to the taxing and spending powers in the Constitution. The proposals of the federal government regarding the taxing powers centered around one main area of concern.

The first proposal was for the adoption of a broad "principle of access", whereby Parliament and the provincial Legislatures would generally have access to all tax fields, the power of Parliament applying across the country and the power of each provincial Legislature extending within the province. The second proposal was for the protection of taxpayers against taxation by more than one province. A third proposal was to limit the taxing powers of both Parliament and the provinces so as to avoid the erection of tax barriers to inter-provincial trade. An overall proposal in this area was concerned with the coordination and communication between the two orders of government. To insure a workable tax system, regular inter-governmental consultation was proposed.

### The Spending Power

The federal government was prepared to discuss a possible limitation on the use of the spending power of Parliament so that in the future it could not unilaterally influence priorities in areas of exclusive provincial jurisdiction through the use of conditional grants to the provinces. The proposals for change were to establish a satisfactory formula for determining when there was a national consensus in favour of a particular program; and a satisfactory formula for compensation of individuals in non-participating provinces.

### Income Security

The first federal proposal was that Parliament and the provincial Legislatures should have equal powers to make general income support payments to persons. The second federal proposal was that Parliament and the provincial Legislatures ought to have concurrent powers with respect to public income insurance matters with the following exceptions:

- unemployment insurance should continue to be a matter of exclusive federal jurisdiction,
- workmen's compensation should continue to be a matter of exclusive provincial jurisdiction, and
- retirement insurance should continue to be a matter of concurrent jurisdiction but with federal powers being paramount.

### Social Services

The federal government proposed that provincial Legislatures ought to continue to have exclusive jurisdiction over social services. There should, however, be some federal power to ensure portability of benefits, and to ensure minimum standards in all provinces.

## Capital Markets and Financial Institutions

The federal government put forward proposals in four areas concerning this subject: currency and banking, credit control, financial institutions, and the securities market.

In the first of these, the federal government proposed that there be a continuation of federal jurisdiction over currency and banking, but that the present federal jurisdiction over savings banks be transferred to the provinces. It was generally agreed that the chartered banks should continue as a federal responsibility.

In the second area, credit control, the federal government proposed that the Constitution should provide for explicit concurrent powers over credit. For most purposes, the provincial power would be paramount, however this paramountcy would be federal where the federal legislation was made for national economic purposes.

In the third area, the federal proposal called for exclusive federal power to regulate financial institutions which carried on business in two or more provinces or internationally, and exclusive provincial power to regulate financial institutions, other than banks, which carried on business only within one province.

In the fourth and final areas, the federal proposal was that in the revision of the Constitution, Parliament should be given specific powers to make laws with respect to securities. In presenting this proposal, the federal government indicated that it had been designed to meet the needs of future years when some sort of national securities administration would be necessary to ensure an orderly and efficient marketing system, both internationally and domestically.



## Environmental Management

Environmental management and the control of pollution were discussed by First Ministers as a subject requiring current solutions which had important constitutional implications.

The federal proposal was that there should be a new concurrent power for Parliament and the provincial Legislatures to make laws in relation to pollution of air and water.

Under the terms of this proposal, where there was a conflict between a federal law and a provincial law made under this power, the federal law would prevail if it applied to the control of pollution which had, or if permitted, would have significant international or inter-provincial effects. Provincial powers would prevail in control of pollution originating in and only having significant effects within the province.

In conclusion, although the above presents a disparate list of topics ranging from reform of the Senate to environmental management, it may be seen that all of these topics were linked as they were part of the important period of constitutional consultation that led to the Canadian Constitutional Charter at Victoria in 1971.

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CONSTITUTIONAL CONFERENCE  
PROCEEDINGS

VICTORIA, BRITISH COLUMBIA

JUNE 14, 1971



## FOREWORD

The Constitutional Conference met in Victoria on June 14, 15 and 16, 1971. This was the seventh in the series of conferences of First Ministers on the Constitution which began in February 1968. The meeting was held in Victoria on the invitation of the Prime Minister of British Columbia to mark the centennial of the province's entry into Confederation.

The proceedings at the opening session of the Conference were broadcast on radio and television and given extensive national press coverage. The main objective of the meeting was to consider constitutional provisions to give effect to proposals for constitutional change which had been discussed during the course of the review. This was accomplished in a number of important areas so that it was possible, at the end of the Conference, to make public a draft Canadian Constitutional Charter which was to be immediately submitted to governments. The Charter contained specific constitutional provisions on political and language rights, the Supreme Court of Canada and other courts of Canada, legislative powers with respect to certain aspects of social policy, the territorial composition of Canada, regional disparities, federal-provincial consultation, procedures for the amendment of the Constitution and modernization.

The Charter was subsequently approved by the Government of Canada and the governments of eight provinces. The Government of the Province of Quebec, however, did not give its approval to the document. The Government of Saskatchewan changed pursuant to the election of June 23, 1971, and thus far the present government has not taken a position on the Charter.

## HEADS OF DELEGATIONS

The Right Honourable Pierre Elliott Trudeau,  
Prime Minister of Canada

Honourable William G. Davis, Prime Minister of Ontario

Honourable Robert Bourassa, Prime Minister of Quebec

Honourable Gerald A. Regan, Premier of Nova Scotia

Honourable Richard Hatfield, Premier of New Brunswick

Honourable Edward Schreyer, Premier of Manitoba

Honourable W.A.C. Bennett, Prime Minister and Minister  
of Finance of British Columbia

Honourable Alexander B. Campbell, Premier and Minister  
of Development of Prince Edward Island

Honourable D.V. Heald, Attorney General of Saskatchewan

Honourable Harry E. Strom, Premier of Alberta

Honourable J.R. Smallwood, Premier of Newfoundland



CONSTITUTIONAL CONFERENCEVICTORIAJUNE 14-16, 1971STATEMENT OF CONCLUSIONS

1. The 7th meeting of the Constitutional Conference was held in Victoria on June 14-16, 1971, on the occasion of the 100th anniversary of the entry of British Columbia into Confederation.
2. The Conference discussions dealt with constitutional provisions as set forth in a Charter which is based on the consensus arrived at in the Working Session of the Constitutional Conference in February 1971. While that consensus was the starting point, the negotiations at the Victoria Conference have been extensive and far-reaching. The First Ministers have agreed that the texts as drafted are of such importance that they should be reported to all governments for consideration. If the Charter, which is to be treated as a whole, is accepted, and this acceptance is communicated to the Secretary of the Constitutional Conference by Monday, June 28th, 1971, governments will recommend the Charter to their Legislative Assemblies and, in the case of the federal government, to both Houses of Parliament.
3. The acceptance of the Charter by both Houses of Parliament and by the Legislative Assemblies would enable the necessary action to be taken to patriate the Canadian Constitution, so that the power to amend and to enact constitutional provisions will rest exclusively with the Canadian people.
4. The proposed Charter also contains the terms of a formula for amending the Constitution entirely within Canada, and a number of other provisions to be incorporated into the Constitution at the time of patriation. These provisions are concerned with certain basic political and language rights, regional disparities, the Supreme Court of Canada, federal-provincial consultation, and the repeal of reservation and disallowance. In addition, a number of steps would be taken to bring the language of the Constitution up to date, including the renaming of certain enactments, and the deletion of spent and irrelevant provisions.

5. The Constitutional Conference also discussed the subject of social policy. It agreed to include in the proposed Charter an amendment to Section 94A of the B.N.A. Act by adding to its provisions family, youth and occupational training allowances. In addition, a new sub-section is to be added requiring consultation by the Government of Canada with Provinces on any proposed legislation in relation to a matter covered by the revised section.
6. An early meeting of First Ministers will be held to discuss all aspects of federal-provincial fiscal arrangements, including tax reform, shared-cost programmes, equalization and tax sharing.
7. First Ministers expressed their appreciation to the Prime Minister of British Columbia for his hospitality in receiving the Conference in Victoria in his Province's centennial year.

CANADIAN CONSTITUTIONAL

CHARTER

1971

PART I  
POLITICAL RIGHTS

Art. 1        It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

freedom of thought, conscience  
and religion,  
freedom of opinion and expression,  
and  
freedom of peaceful assembly and of  
association;

and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.

Art. 2.        No law of the Parliament of Canada or the Legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

Art. 3.        Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.

Art. 4.        The principles of universal suffrage and free democratic elections to the House of Commons and to the Legislative Assembly of each Province are hereby proclaimed to be fundamental principles of the Constitution.

Art. 5.        No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote in an election of members to the House of Commons or the Legislative Assembly of a Province, or be disqualified from membership therein.

Art. 6.        Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House and no longer, subject to being sooner dissolved

by the Governor General, except that in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by the Parliament of Canada if the continuation is not opposed by the votes of more than one third of the members of the House.

Art. 7. Every Provincial Legislative Assembly shall continue for five years from the day of the return of the writs for the choosing of the Legislative Assembly, and no longer, subject to being sooner dissolved by the Lieutenant-Governor, except that when the Government of Canada declares that a state of real or apprehended war, invasion or insurrection exists, a Provincial Legislative Assembly may be continued if the continuation is not opposed by the votes of more than one third of the members of the Legislative Assembly.

Art. 8. There shall be a session of the Parliament of Canada and of the Legislature of each Province at least once in every year, so that twelve months shall not intervene between the last sitting of the Parliament or Legislature in one session and its first sitting in the next session.

Art. 9. Nothing in this Part shall be deemed to confer any legislative power on the Parliament of Canada or the Legislature of any Province.



PART II  
LANGUAGE RIGHTS

Art. 10. English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 11. A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 12. The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes shall be authoritative.

Art. 13. The statutes of each Province shall be printed and published in English and French, and where the Government of a Province prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language; the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative.

Art. 14. A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of the other Provinces.

Art. 15. An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the Governments of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

Art. 16. A Provincial Legislative Assembly may, by resolution, declare that any part of Articles 13, 14, and

15 that do not expressly apply to that Province shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts shall apply to the Legislative Assembly, courts and offices specified according to the terms of the resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure prescribed in Article 50.

Art. 17. A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 18. In addition to the rights provided by this Part, the Parliament of Canada and the Legislatures of the Provinces may, within their respective legislative jurisdictions, provide for more extensive use of English and French.

Art. 19. Nothing in this Part shall be construed as derogating from or diminishing any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Part with respect to any language that is not English or French.

## PART III

## PROVINCES AND TERRITORIES

Art. 20. Until modified under the authority of the Constitution of Canada, Canada consists of ten Provinces, named Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, two Territories, named the Northwest Territories and the Yukon Territory, and such other territory as may at any time form part of Canada.

Art. 21. There shall be a Legislature for each Province consisting of a Lieutenant-Governor and a Legislative Assembly.

PART IV  
SUPREME COURT OF CANADA

Art. 22. There shall be a general court of appeal for Canada to be known as the Supreme Court of Canada.

Art. 23. The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada, and eight other judges, who shall, subject to this Part, be appointed by the Governor General in Council by letters patent under the Great Seal of Canada.

Art. 24. Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the Bar of any Province, has, for a total period of at least ten years, been a judge of any court in Canada or a barrister or advocate at the Bar of any Province.

Art. 25. At least three of the judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the Bar of the Province of Quebec, have, for a total period of at least ten years, been judges of any court of that Province or of a court established by the Parliament of Canada or barristers or advocates at that Bar.

Art. 26. Where a vacancy arises in the Supreme Court of Canada and the Attorney General of Canada is considering a person for appointment to fill the vacancy, he shall inform the Attorney General of the appropriate Province.

Art. 27. When an appointment is one falling within Article 25 or the Attorney General of Canada has determined that the appointment shall be made from among persons who have been admitted to the Bar of a specific Province, he shall make all reasonable efforts to reach agreement with the Attorney General of the appropriate Province, before a person is appointed to the Court.

Art. 28. No person shall be appointed to the Supreme Court of Canada unless the Attorney General of Canada and the Attorney General of the appropriate Province agree to the appointment, or such person has been recommended for appointment to the Court by a nominating council described in Article 30, or has been selected by the Attorney General of Canada under Article 30.

Art. 29. Where after the lapse of ninety days from the day a vacancy arises in the Supreme Court of Canada, the Attorney General of Canada and the Attorney General of a Province have not reached agreement on a person to be appointed to fill the vacancy, the Attorney General of Canada may inform the Attorney General of the appropriate Province in writing that he proposes to convene a nominating council to recommend an appointment.

Art. 30. Within thirty days of the day when the Attorney General of Canada has written the Attorney General of the Province that he proposes to convene a nominating council, the Attorney General of the Province may inform the Attorney General of Canada in writing that he selects either of the following types of nominating councils:

- (1) a nominating council consisting of the following members: the Attorney General of Canada or his nominee and the Attorneys General of the Provinces or their nominees;
- (2) a nominating council consisting of the following members: the Attorney General of Canada or his nominee, the Attorney General of the appropriate Province or his nominee and a Chairman to be selected by the two Attorneys General, and if within six months from the expiration of the thirty days they cannot agree on a Chairman, then the Chief Justice of the appropriate Province or if he is unable to act, the next senior judge of his court, shall name a Chairman;

and if the Attorney General of the Province fails to make a selection within the thirty days above referred to, the Attorney General of Canada may select the person to be appointed.

Art. 31. When a nominating council has been created, the Attorney General of Canada shall submit the names of not less than three qualified persons to it about whom he has sought the agreement of the Attorney General of the appropriate Province to the appointment, and the nominating council shall recommend therefrom a person for appointment to the Supreme Court of Canada; a majority of the members of a council constitutes a quorum, and a recommendation of a majority of the members at a meeting constitutes a recommendation of the council.



Art. 32. For the purpose of Articles 26 to 31 "appropriate Province" means, in the case of a person being considered for appointment to the Supreme Court of Canada in compliance with Article 25, the Province of Quebec, and in the case of any other person being so considered, the Province to the Bar of which such person was admitted, and if a person was admitted to the Bar of more than one Province, the Province with the Bar of which the person has, in the opinion of the Attorney General of Canada, the closest connection.

Art. 33. Articles 26 to 32 do not apply to the appointment of the Chief Justice of Canada when such appointment is made from among the judges of the Supreme Court of Canada.

Art. 34. The judges of the Supreme Court of Canada hold office during good behaviour until attaining the age of seventy years, but are removable by the Governor General on address of the Senate and House of Commons.

Art. 35. The Supreme Court of Canada has jurisdiction to hear and determine appeals on any constitutional question from any judgment of any court in Canada and from any decision on any constitutional question by any such court in determining any question referred to it, but except as regards appeals from the highest court of final resort in a Province, the Supreme Court of Canada may prescribe such exceptions and conditions to the exercise of such jurisdiction as may be authorized by the Parliament of Canada.

Art. 36. Subject to this Part, the Supreme Court of Canada shall have such further appellate jurisdiction as the Parliament of Canada may prescribe.

Art. 37. The Parliament of Canada may make laws conferring original jurisdiction on the Supreme Court of Canada in respect of such matters in relation of the laws of Canada as may be prescribed by the Parliament of Canada, and authorizing the reference of questions of law or fact to the Court and requiring the Court to hear and determine the questions.

Art. 38. Subject to this Part, the judgment of the Supreme Court of Canada in all cases is final and conclusive.

Art. 39. Where a case before the Supreme Court of Canada involves questions of law relating to the civil law of the Province of Quebec, and involves no other question of law, it shall be heard by a panel of five judges, or with the consent of the parties, four judges, at least three of whom have the qualifications described in Article 25, and if for any reason three judges of the Court who have such qualifications are not available, the Court may name such ad hoc judges as may be necessary to hear the case from among the judges who have such qualifications serving on a superior court of record established by the law of Canada or of a superior court of appeal of the Province of Quebec.

Art. 40. Nothing in this Part shall be construed as restricting the power existing at the commencement of this Charter of a Provincial Legislature to provide for or limit appeals pursuant to its power to legislate in relation to the administration of justice in the Province.

Art. 41. The salaries, allowances and pensions of the judges of the Supreme Court of Canada shall be fixed and provided by the Parliament of Canada.

Art. 42. Subject to this Part, the Parliament of Canada may make laws to provide for the organization and maintenance of the Supreme Court of Canada, including the establishment of a quorum for particular purposes.

PART V  
COURTS OF CANADA

Art. 43. The Parliament of Canada may, notwithstanding anything in the Constitution of Canada, from time to time provide for the constitution, maintenance, and organization of courts for the better administration of the laws of Canada, but no court established pursuant to this Article shall derogate from the jurisdiction of the Supreme Court of Canada as a general court of appeal for Canada.

PART VI  
REVISED SECTION 94A

Art. 44. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits including survivors' and disability benefits irrespective of age, and in relation to family, youth, and occupational training allowances, but no such law shall affect the operation of any law present or future of a Provincial Legislature in relation to any such matter.

Art. 45. The Government of Canada shall not introduce a bill in the House of Commons in relation to a matter described in Article 44 unless it has, at least ninety days before such introduction, advised the Government of each Province of the substance of the proposed legislation and requested its views thereon.

## PART VII

### REGIONAL DISPARITIES

Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:

- (1) the promotion of equality of opportunity and well being for all individuals in Canada;
- (2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
- (3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Art. 47. The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.

## PART VIII

### FEDERAL-PROVINCIAL CONSULTATION

Art. 48. A Conference composed of the Prime Minister of Canada and the First Ministers of the Provinces shall be called by the Prime Minister of Canada at least once a year unless, in any year, a majority of those composing the Conference decide that it shall not be held.

PART IX  
AMENDMENTS TO THE CONSTITUTION

Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes

- (1) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;
- (2) at least two of the Atlantic Provinces;
- (3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

Art. 50. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

Art. 51. An amendment may be made by proclamation under Article 49 or 50 without a resolution of the Senate authorizing the issue of the proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.



Art. 52. The following rules apply to the procedures for amendment described in Articles 49 and 50:

- (1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;
- (2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Art. 53. The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons.

Art. 54. In each Province the Legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the Province.

Art. 55. Notwithstanding Articles 53 and 54, the following matters may be amended only in accordance with the procedure in Article 49:

- (1) the office of the Queen, of the Governor General and of the Lieutenant-Governor;
- (2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;
- (3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;
- (4) the powers of the Senate;
- (5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators;
- (6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;

- (7) the principles of proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada; and
- (8) except as provided in Article 16, the requirements of this Charter respecting the use of the English or French language.

Art. 56. The procedure prescribed in Article 49 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but that procedure may nonetheless be used to amend any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 57. In this Part, "Atlantic Provinces" means the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and "Western Provinces" means the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

## PART X

## MODERNIZATION OF THE CONSTITUTION

Art. 58. The provisions of this Charter have the force of law in Canada notwithstanding any law in force on the day of its coming into force.

Art. 59. The enactments set out in the first column of the Schedule, hereby repealed to the extent indicated in the second column thereof, shall continue as law in Canada under the names set forth in the third column thereof and as such shall, together with this Charter, collectively be known as the Constitution of Canada, and amendments thereto shall henceforth be made only according to the authority contained therein.

Art. 60. Every enactment that refers to an enactment set out in the Schedule by the name in the first column thereof is hereby amended by substituting for that name the name in the third column thereof.

Art. 61. The Court existing on the day of the coming into force of this Charter under the name of the Supreme Court of Canada shall continue as the Supreme Court of Canada, and the judges thereof shall continue in office as though appointed under Part IV except that they shall hold office during good behaviour until attaining the age of seventy-five years, and until otherwise provided pursuant to the provisions of that Part, all laws pertaining to the Court in force on that day shall continue, subject to the provisions of this Charter.

This Schedule is NOT final,  
subject to confirmation

S C H E D U L E

Enactments	Extent of Repeal	New Name
British North America Act, 1867, 30-31 Vict., c. 3 (U.K.).	Long title; preamble; the heading immediately preceding section 1; sections 1, 5, the words between brackets in section 12; sections 19, 20, 37, 40, 41, 47, 50, the words "and to Her Majesty's Instructions" and the words "or that he reserves the Bill for the Signification of the Queen's Pleasure" in section 55; sections 56, 57, 63; the words between brackets in section 65; sections 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84, 85, 86; the words "the Disallowance of Acts, and the Signification of Pleasure on Bills reserved" and the words "of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada" in section 90; head (1) of section 91; head (1) of section 92; 94A; sections 101, 103, 104, 105, 106, 107, 119, 120, 122, 123; the words between brackets in section 129; sections 130, 134, 141, 142; the heading immediately preceding section 146; sections 146, 147; the First Schedule; the Second Schedule.	Constitution Act, 1867.
An Act to amend and continue the Act 32 and 33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.).	Long title; Enacting clause; sections 3, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 25.	Manitoba Act, 1870.
Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May 1871.	The whole except terms 4, 9, 10, 13, 14 in the Schedule.	British Columbia Terms of Union.

Enactments	Extent of Repeal	New Name
British North America Act, 1871, 34-35 Vict., c. 28 (U.K.), and all acts enacted under section 3 thereof.	Long title; preamble, enacting clause; sections 1, 6.	Constitution Act, 1871.
Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.	The whole, except the conditions in the Schedule relating to the provision of steam service and telegraphic communication between the Island and the mainland, the condition respecting the constitution of the executive authority and the Legislature of the Province, and the condition applying the British North America Act, 1867 to the Province.	Prince Edward Island Terms of Union
Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.).	Long title; preamble, enacting clause.	Parliament of Canada Act, 1875.
Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.	The whole, except the last paragraph.	Adjacent Territories Order.
British North America Act, 1886, 49-50 Vict., c. 35 (U.K.).	Long title; section 3.	Constitution Act, 1886.
Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)	Long title; preamble; enacting clause.	Canada (Ontario Boundary) Act, 1889.



Enactments	Extent of Repeal	New Name
Canadian Speaker (Appointment of Deputy) Act, 1895, Session 2, 59 Vict., c. 3 (U.K.).	Long title; preamble, enacting clause, section 2.	Canadian Speaker (Appointment of Deputy) Act, 1895.
Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.).	Long title; enacting clause, sections 4, 5, 6, 7, 12, 13, 15, 16(2), 18, 19, 20, Schedule.	Alberta Act.
Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.).	Long title; enacting clause; sections 4, 5, 6, 7, 12, 13, 14, 15, 16(2), 18, 19, 20, Schedule.	Saskatchewan Act.
British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.).	Long title; preamble, enacting clause, section 2, Schedule.	Constitution Act, 1907.
British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.).	Long title; enacting clause, section 3.	Constitution Act, 1915.
British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.).	Long title; fourth paragraph of preamble, enacting clause, section 3.	Constitution Act, 1930.
Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.). In so far as it applies to Canada.	Long title; the words "and Newfoundland" in sections 1 and 10(3); section 4 in so far as it applies to Canada; section 7(1).	Statute of Westminster, 1931.
British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.).	Long title; preamble, enacting clause, section 2.	Constitution Act, 1940.
British North America Act, 1943, 7 Geo. VI, c. 30 (U.K.).	The whole.	
British North America Act, 1946, 10 Geo. VI, c. 63 (U.K.).	Long title; preamble, enacting clause, section 2.	Constitution Act, 1946.

Enactments	Extent of Repeal	New Name
British North America Act, 1949, 12 and 13 Geo. VI, c. 22 (U.K.).	Long title; third paragraph in preamble; enacting clause; sections 2, 3; terms 6(2), (3), 15(2), 16, 22(2), (4), 24, 27, 28, 29 in the Schedule.	Constitution Act, 1949.
British North America (No. 2) Act, 1949 (U.K.). 13 Geo. VI, C. 81 (U.K.)	The whole.	
British North America Act, R.S.C., 1952, c. 304 (Can.).	Section 2.	Constitution Act, 1952.
British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.).	Long title; preamble; enacting clause; sections 2, 3.	Constitution Act, 1960.
British North America Act, 1964, 12 and 13, Eliz. II, c. 73 (U.K.).	Long title; enacting clause; section 2.	Constitution Act, 1964.
British North America Act, 1965, 14 Eliz. II, c. 4, Part I, (Can.).	Section 2.	Constitution Act, 1965.

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The following extracts are from the final report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. The report is the result of a two year study undertaken to examine and report upon proposals for constitutional reform raised during the period 1968-1970.

The Special Joint Committee held 145 public meetings, and received more than 8,000 pages of evidence. The Committee travelled extensively throughout Canada, visiting all Provinces and Territories, and heard the views and opinions of Canadians from all walks of life on the fundamental issues confronting Canada and its constitutional development. Included in this evidence were the views of acknowledged experts on the Constitution.

The length of the complete document prohibits its inclusion in a documentation kit in its entirety; we have therefore selected specific pages for your use. Pages 43-45 provide an interesting discussion of the distribution of powers. The summary of recommendations illustrates to the reader the vast scope of the proposals for constitutional reform dealt with by the Special Joint Committee.

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The Special Joint Committee of the Senate  
and of the House of Commons on the

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# CONSTITUTION OF CANADA

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## FINAL REPORT

Joint Chairmen:

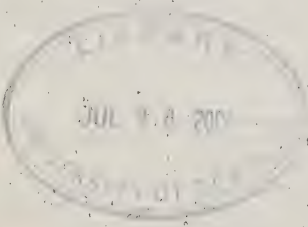
Senator Gildas L. Molgat

Mark MacGuigan, M.P.

Fourth Session

Twenty-eighth Parliament

1972





## SUMMARY OF RECOMMENDATIONS

### PART I—THE CONSTITUTION

#### *Chapter 1—Constitutional Imperatives*

1. Canada should have a new and distinctively Canadian Constitution, one which would be a new whole even though it would utilize many of the same parts.
2. A new Canadian Constitution should be based on functional considerations, which would lead to greater decentralization of governmental powers in all areas touching culture and social policy and to greater centralization in powers which have important economic effects at the national level. Functional considerations also require greater decentralization in many areas of governmental administration.

#### *Chapter 4—Patriation of the Constitution*

3. The Canadian Constitution should be patriated by a procedure which would provide for a simultaneous proclamation of a new Constitution by Canada and the renunciation by Britain of all jurisdiction over the Canadian Constitution.

#### *Chapter 5—Amendments to the Constitution*

4. The formula for amending the Constitution should be that contained in the Victoria Charter of June 1971, which requires the agreement of the Federal Parliament and a majority of the Provincial Legislatures, including those of:
  - (a) every province which at any time has contained twenty-five per cent of the population of Canada;
  - (b) at least two Atlantic Provinces;
  - (c) at least two Western Provinces that have a combined population of at least fifty per cent of the population of all the Western Provinces.

#### *Chapter 6—The Preamble to the Constitution*

5. The Canadian Constitution should have a preamble which would proclaim the basic objectives of Canadian federal democracy.

### PART II—THE PEOPLE

#### *Chapter 7—Self-Determination*

6. The preamble of the Constitution should recognize that the Canadian federation is based on the liberty of the person and the protection of basic human rights as a fundamental and essential purpose of the State. Consequently, the preamble should also recognize that the existence of Canadian society rests on the free consent of its citizens and their collective will to live together, and that any differences among them should be settled by peaceful means.
7. If the citizens of a part of Canada at some time democratically declared themselves in favour of a political arrangement which were contrary to the continuation of our present political structures, the disagreement should be resolved by political negotiation, not by the use of military or other coercive force.
8. We reaffirm our conviction that all of the peoples of Canada can achieve their aspirations more effectively within a federal system, and we believe Canadians should strive to maintain such a system.

#### *Chapter 8—Native Peoples*

9. No constitutional changes concerning native peoples should be made until such time as their own organizations have completed their research into the question of treaty and aboriginal rights in Canada.
10. The preamble of the new Constitution should affirm the special place of native peoples, including Métis, in Canadian life.
11. Provincial governments should, where the population is sufficient, consider recognizing Indian languages as regional languages.
12. No jurisdictional changes should be made in administrative arrangements concerning Indians and Eskimos without consultation with them.

#### *Chapter 9—Fundamental Rights*

13. Canada should have a Bill of Rights entrenched in the Constitution, guaranteeing the political freedoms

of conscience and religion, of thought, opinion and expression, of peaceful assembly and of association.

14. The Bill of Rights should include a provision requiring fair and equitable representation in the House of Commons and in the Provincial Legislatures.
15. The right to citizenship, once legally acquired, should be made inalienable under the Bill of Rights.
16. The individual person should be constitutionally protected in his life, liberty and the security of his person so as not to be deprived thereof except in accordance with the principles of fundamental justice.
17. The individual person should be constitutionally protected against the arbitrary seizure of his property, except for the public good and for just compensation.
18. The Constitution should prohibit discrimination by reason of sex, race, ethnic origin, colour or religion by proclaiming the right of the individual to equal treatment by law.
19. Discrimination in employment, or in membership in professional, trade or other occupational associations, or in obtaining public accommodation and services, or in owning, renting or holding property should also be declared contrary to the Bill of Rights.
20. Other provisions already contained in the Canadian Bill of Rights (1960) protecting legal rights should also be included in the Constitutional Bill of Rights: protection against unreasonable searches and seizures, the right to be informed promptly of the reason for arrest, the right to counsel, the right to habeas corpus, protection against self-crimination, the right to a fair hearing, the right to be presumed innocent and not to be denied reasonable bail without just cause, the right to an interpreter, the proscribing of retroactive penal laws or punishments, and the right not to be subjected to cruel and unusual punishment.
21. The rights and freedoms recognized by the Bill of Rights should not be interpreted as absolute and unlimited, but should rather be exercisable to the extent that they are reasonably justifiable in a democratic society.

#### Chapter 10—Language Rights

22. French and English should be constitutionally entrenched as the two official languages of Canada.
23. The Constitution should recognize:
  - (a) the right of any person to use either official language in the Federal and Provincial Legislatures and the Territorial Councils;
  - (b) the right to have access in both official languages to the legislative records, journals, and enactments of Canada, New Brunswick, Ontario, Quebec and the Territories;
  - (c) the right to use either official language in dealing with judicial or quasi-judicial Federal bodies or

with courts in New Brunswick, Ontario, Quebec and the Territories;

- (d) the right to communicate in either official language with Federal departments and agencies and with provincial departmental head offices or agency head offices in New Brunswick, Ontario, Quebec and the Territories.
24. All of the rights in recommendation 23 (b) (c) and (d) should also be exercisable in:
    - (a) any Province where each language is the mother tongue of ten per cent of the population;
    - (b) in any Province where the legislature declares French and English the official languages of the province.
  25. The Constitution should recognize parents' right to have English or French provided as their child's main language of instruction in publicly supported schools in areas where the language of their choice is chosen by a sufficient number of persons to justify the provision of the necessary facilities.
  26. We support the general objective of making French the working language in Quebec. We hope that through the studies being carried out in Quebec on this matter, this objective can be reached with due respect for certain Quebec Anglophone institutions, and taking into account the North American and world reality.
  27. The preamble to the Constitution should formally recognize that Canada is a multicultural country.
  28. The Constitution should explicitly recognize the right of Provincial Legislatures to confer equivalent status with the English and French languages on other languages. Federal financial assistance to support the teaching or use of other languages would be appropriate.

#### Chapter 11—Regional Disparities

29. The equitable distribution of income should be recognized in the preamble of the Constitution as a dynamic and humane objective of our social policy. Consequently, we agree with the principle stated in the Victoria Charter that:

The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to . . . the promotion of equality of opportunity and well-being for all individuals in Canada.

30. We agree with the statement in the Victoria Charter that:

The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to . . . the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada.

This objective should be recognized in the preamble of the Constitution.

31. The preamble of the Constitution should provide that every Canadian should have access to adequate Federal, Provincial and municipal services without having to bear a disproportionate tax burden because of the region in which he lives. This recommendation follows logically from our acceptance of the principle of equality of opportunity for all Canadians.

32. We completely accept the following objective as stated in the Victoria Charter:

The promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

As in the case of redistribution of income among individuals and for the same reasons, this objective should be recognized in the preamble of the Constitution.

### PART III—FEDERAL INSTITUTIONS

#### *Chapter 12—The Head of State*

33. Because of the state of divided opinion in Canada, the Committee does not recommend any change in the monarchical system at the present time.

34. The Committee itself prefers a Canadian as Head of State, and supports the evolutionary process by which the Governor General has been granted more functions as the Head of State for Canada. Eventually, the question of retaining or abolishing the Monarchy will have to be decided by way of clear consultation with the Canadian people.

#### *Chapter 13—The Senate*

35. The present full veto power of the Senate over legislation should be reduced to a suspensive veto for six months according to the following formula: a bill may become law without the consent of the Senate (1) if the House of Commons, having once passed it, passes it again no less than six months after it was rejected or finally amended by the Senate, or, (2) if, within 6 months of third reading of a bill by the House of Commons the Senate has not completed consideration of it, and the House of Commons again passes it at any time after the expiration of the 6 months, but any period when Parliament is prorogued or dissolved shall not be counted in computing the 6 months.

36. The investigating role of the Senate, which has gained more importance in recent years, should be continued and expanded at the initiative of the Senate itself, and the Government should also make more use of the Senate in this way.

37. The Government should be entitled to introduce in the Senate all bills including money bills but excluding appropriation bills, before their approval by the House of Commons, provided that, in the case of money bills, they should be introduced by the leader of the Government in the Senate on behalf of the Government.

38. The distribution of Senators should be as follows: Newfoundland 6, Prince Edward Island 4, Nova Scotia 10, New Brunswick 10, Quebec 24, Ontario 24, Manitoba 12, Saskatchewan 12, Alberta 12, British Columbia 12, the Yukon Territory 2, and the Northwest Territories 2: a total of 130.

39. All Senators should continue to be appointed by the Federal Government: as vacancies occur in the present Senate, one-half of the Senators from each Province and Territory should be appointed in the same manner as at present; the other half from each Province and Territory should be appointed by the Federal Government from a panel of nominees submitted by the appropriate Provincial or Territorial Government.

40. The personal requirements for appointment to the Senate should be limited to those required for eligibility as an elector in the Canada Elections Act, plus residence in the province for which a Senator is appointed. The Quebec structure of electoral divisions should be abolished.

41. The compulsory retirement age for all new senators should be seventy years. Upon retirement, Senators should retain the right to the title and precedence of Senators and the right to participate in the work of the Senate or of its Committee, but not the right to vote or to receive the indemnity of Senators.

#### *Chapter 14—The House of Commons*

42. The mechanism of redistribution of seats in the House of Commons as well as the limitations implied in the 15 per cent rule and the Senate rule should be retained in the Constitution. The formula of representation, however, subject to our recommendations on the Bill of Rights, should be the exclusive prerogative of the House of Commons, to be dealt with by ordinary legislation.

43. Every House of Commons should continue for four years, from the day of the return of the writs for choosing the House and no longer, provided that, and notwithstanding any Royal Prerogative, the Governor General should have the power to dissolve Parliament during that period:

(1) when the Government is defeated

(a) on a motion expressing no confidence in the Government; or

(b) on a vote on a specific bill or portion of a bill which the Government has previously declared should be construed as a motion of want of confidence; or

(2) when the House of Commons passes a resolution requesting dissolution of Parliament.

#### *Chapter 15—The Supreme Court of Canada*

44. The existence, independence and structure of the Supreme Court of Canada should be provided for in the Constitution.



45. Consultation with the Provinces on appointments to the Supreme Court of Canada must take place. We generally support the methods of consultation proposed in the Victoria Charter, but the Provinces should also be allowed to make nominations to the nominating councils which would be set up under the Victoria proposals if the Attorney-General of Canada and the Attorney-General of a province fail to agree on an appointee.
46. The Provinces should be given the right to withdraw appeals in matters of strictly provincial law from the Supreme Court of Canada and to vest final decision on such matters in their own highest courts, thus leaving to the Supreme Court of Canada jurisdiction over matters of Federal law and of constitutional law, including the Bill of Rights. The issue of whether a matter was one of strictly provincial law would be subject to determination by the Supreme Court of Canada.

#### *Chapter 16—The National Capital Area*

47. There should be a movement by stages towards the possible creation of an autonomous Canadian Capital.
48. The Canadian Capital should be generally the areas of Ontario and of Quebec now defined in the schedule to the National Capital Act (1959).

### **PART IV—THE GOVERNMENTS**

#### *Chapter 17—The Division of Powers*

49. The use of exclusive lists of Federal and Provincial powers, but with an extended list of concurrent powers, should be continued.
50. Concurrent powers which predominantly affect the national interest should grant paramountcy to the Federal Parliament and those which predominantly affect Provincial or local interests should grant paramountcy to the Provincial legislatures.
51. The Constitution should permit the delegation of executive and administrative powers (as at present), but not of legislative powers except where expressly specified in this Report.

#### *Chapter 18—The General Legislative Power of Parliament*

52. The "Peace, Order, and good Government" power should be retained in the Constitution as an expression of the overriding Federal legislative power over matters of a national nature.
53. Since the Federal General Legislative Power is counterbalanced by a Provincial power over matters of a Provincial or local nature, there is no place for a purely residuary power.

#### *Chapter 19—Taxing Powers*

54. Generally speaking and subject to recommendation 55, we endorse the principle that the Federal and

Provincial Governments should have access to all fields of taxation. However, in order to bring about a division of revenues that may accurately reflect the priorities of each government, there should be Federal-Provincial consultations to determine the most equitable means of apportioning joint fields of taxation in the light of:

- (a) the projected responsibilities of each level of government in the immediate future;
- (b) the anticipated increases in their respective expenditures;
- (c) economic and administrative limitations, such as preserving sufficient leverage for the Federal Government, by means of its taxation system, to discharge effectively its function of managing the economy.

55. Provincial legislatures should have the right to impose indirect taxes provided that they do not impede interprovincial or international trade and do not fall on persons resident in other Provinces. These limitations could be satisfied by tax collection through an interprovincial or Federal-Provincial collection agency, or by tax collection agreements.

#### *Chapter 20—The Federal Spending Power*

56. The power of the Federal Parliament to make conditional grants for general Federal-Provincial (shared-cost) programs should be subject to the establishment of a national consensus both for the institution of any new program and for the continuation of any existing one. A consensus would be established by the affirmative vote of the Legislatures in three of the four regions of Canada according to the following formula: the vote of the Legislatures in the Atlantic region would be considered to be in the affirmative if any two of the Legislatures of Nova Scotia, New Brunswick or Newfoundland were in favour, the vote of the Legislatures of the Western region would be considered to be in the affirmative with the agreement of any two of the four Legislatures. The consensus for existing joint programs should be tested every 10 years.
57. If a Province does not wish to participate in a program for which there is a national consensus, the Federal Government should pay the Government of that Province a sum equal to the amount it would have cost the Federal Government to implement the program in the Province. However, a tax collection fee of about 1 per cent, equivalent to the cost of collecting the money paid to the Province, should be deducted from the amount paid to such non-participating Provinces.
58. In order that the objectives of joint programs may be more effectively realized, conditional Federal grants should preferably be based on the cost of the programs in each Province. However, since a 50-50 cost-sharing formula, when applied to the expenditures made in each Province, constitutes too great an incentive in high-income Provinces, conditional Federal grants should not be made for that portion of Provincial expenditures which lies above the national average cost of the service. The maximum per

capita amount to which a Province would be entitled would thus correspond to the per capita national expenditure, and additional expenditures by a Provincial Government would in no way increase the Federal grant to that Province.

#### *Chapter 21—Intergovernmental Relations*

59. More communication and fuller cooperation among all levels of government are imperative needs. The achievement of these ends involves the improvement and simplification of the means of liaison and, where necessary, the creation of new mechanisms.
60. The Constitution should provide for a Federal-Provincial Conference of First Ministers to be called by the Prime Minister of Canada at least once a year unless in any year a majority of the First Ministers decide to dispense with the Conference.
61. The Federal Government should appoint a Minister of State for Intergovernmental Affairs to respond to the political challenges and opportunities resulting from closer intergovernmental relationships.
62. A permanent Federal-Provincial secretariat for intergovernmental relations should be established.
63. A tri-level conference among Federal, Provincial and Municipal governments should be called at least once a year.

#### *Chapter 22—Municipalities*

64. While we recognize the difficulties of larger cities in providing for their needs, financing their programs and determining their own priorities, as well as in negotiating with the Provincial and Federal Governments on works which seriously affect municipal planning, and also their need for more status and more autonomy in order to achieve these goals, we do not see how these matters can be entrenched in the Constitution. They should be negotiated between the cities and the Provincial Governments under whose jurisdiction they fall.
65. The municipalities in each Province, in conjunction with their provincial and national bodies, should determine which representatives from what municipalities would attend the annual tri-level conferences we have recommended in Recommendation 63.
66. Such tri-level meetings would not have the power of veto over any Federal or Provincial programs but would rather operate by way of moral suasion.
67. In the light of the injustice done municipalities by their having to rely on the property tax for the bulk of their revenue, there should be a sharing of tax fields between Governments that would allow municipalities direct access to other sources of revenue.
68. Where feasible, representatives of municipalities should meet with other levels of government to discuss common problems particularly in the area of economic planning through representation at meet-

ings of the Ministers of Finance and Provincial Treasurers.

#### *Chapter 23—The Territories*

69. The objective of Government policy for the Yukon and the Northwest Territories should be the fostering of self-government and provincial status.
70. The provisions of the British North America Act, 1871, section 2, which provide for the admission of new provinces by action of the Federal Government alone, should be continued, provided that no territory should become a province without its consent.
71. The Yukon and the Northwest Territories should each be entitled to representation in the Senate.

#### *Chapter 24—Offshore Mineral Rights*

72. The Federal Government should have proprietary rights over the seabed offshore to the limit of Canada's internationally recognized jurisdiction, and the Federal Parliament should have full legislative jurisdiction over this subject matter.
73. There should be no constitutional provision as to the sharing of the profits from the exploitation of seabed resources. Nevertheless, we feel strongly that the Federal Government should share the profits of seabed development equally with the adjacent coastal Province rather than with all of the Provinces.
74. Sable Island should be recognized by the Constitution as part of the Province of Nova Scotia.

#### *Chapter 25—International Relations*

75. Section 132 of the British North America Act should be repealed.
76. The Constitution should make it clear that: the Federal Government has exclusive jurisdiction over foreign policy, the making of treaties, and the exchange of diplomatic and consular representatives.
77. All formal treaties should be ratified by Parliament rather than by the Executive Branch of Government.
78. The Government of Canada should, before binding itself to perform under a treaty an obligation that deals with a matter falling within the legislative competence of the Provinces, consult with the Government of each Province that may be affected by the obligation.
79. The Government of a Province should remain free not to take any action with respect to an obligation undertaken by the Government of Canada under a treaty unless it has agreed to do so.
80. Subject to a veto power in the Government of Canada in the exercise of its exclusive power with respect to foreign policy, the Provincial Governments should have the right to enter into contracts, and administrative, reciprocal and other arrangements with foreign states, or constituent parts of foreign states, to maintain offices abroad for the conduct of Provincial business, and generally to



cooperate with the Government of Canada in its international activities.

## PART V—SOCIAL POLICY

### Chapter 26—Social Security

81. In the area of social security, there should be a greater decentralization of jurisdiction with a view to giving priority to the Provinces according to recommendations 82, 83 and 84.
82. With respect to social services, the present exclusive jurisdiction of Provincial Legislatures should be retained.
83. With respect to income insurance (including the Quebec and Canada Pension Plans), jurisdiction should be shared according to the present section 94A of the British North America Act, subject to the following exceptions:
  - (1) Workmen's Compensation should be retained under the exclusive jurisdiction of the Provincial Legislatures;
  - (2) Unemployment Insurance should be retained under the exclusive jurisdiction of the Canadian Parliament.
84. With respect to income support measures:
  - (1) Financial social assistance (Canada Assistance Plan, allowances to the blind, disability allowances, unemployment assistance) should be under the exclusive jurisdiction of the Provincial Legislatures;
  - (2) Veterans' allowances and allowances to Eskimos and Indians living on reserves should continue to be the exclusive responsibility of the Canadian Parliament;
  - (3) Demographic grants (old age pensions, family allowances and youth allowances) and guaranteed income payments (guaranteed income supplement) should be matters of concurrent jurisdiction with limited Provincial paramountcy as to the scale of benefits and the allocation of Federal funds among these income support programs. Thus the Federal Parliament would retain concurrent power to establish programs and to pay benefits to individuals under these programs. However, a Province would have the right to vary the national scheme established by Parliament with respect to the allocation within the Province between the various programs of the total amount determined by the Federal Government and with respect to the scale of benefits paid to individuals within the Province according to income, number of children, etc., within each program; provided that the benefits paid to individuals under each program should not be less than a certain percentage (perhaps half or two-thirds) of the amounts which would be paid under the scheme proposed by the Federal Government.

### Chapter 27—Criminal Law

85. Since we believe that each Province should be able to regulate the conduct of its own people in such matters as the operation of motor vehicles, Sunday observance, betting and lotteries, the Federal Parliament should have the right to delegate even to a single Province legislative jurisdiction over any part of the criminal law.
86. Because there is some ambiguity resulting from current practice, if not from the Constitution, the Federal power over the administration of criminal justice should be made clear so that the Federal Parliament would be seen to have clear and undoubted jurisdiction to enforce its own laws in the criminal field.

### Chapter 28—Marriage and Divorce

87. In keeping with our principle of control by the Provinces of their social destiny, the jurisdiction over "Marriage and Divorce" should be transferred to the Provincial Legislatures, subject to an agreed common definition of domicile.

### Chapter 29—Education

88. Education as such should remain an exclusively Provincial power as at present, subject to the guarantees for minorities set out elsewhere in this Report.
89. The Provinces should create a permanent office for cooperation and coordination in education, and Federal participation should be confined to the area of Federal jurisdiction over the education of native peoples, immigrants, and defence personnel and dependents.

### Chapter 30—Communications

90. The Parliament of Canada should retain exclusive jurisdiction over the means in broadcasting and other systems of communication.
91. The Provinces should have exclusive jurisdiction over the program content in provincial educational broadcasting, whatever means of communication is employed.

## PART VI—THE REGULATION OF THE ECONOMY

### Chapter 31—Economic Policy

92. The Federal Parliament and Government should retain the primary responsibility for general economic policy designed to achieve national economic goals. This means that they must have sufficient economic powers to regulate the economy through structural, monetary and fiscal policies.

93. National economic policies should take more account of regional objectives through coordinating mechanisms between governments and through considerable administrative decentralization in the operation of the Federal Government and its agencies.

94. Provincial and municipal governments should also take more account of national economic objectives.

#### *Chapter 32—Trade and Commerce*

95. Parliament should have exclusive jurisdiction over international and interprovincial trade and commerce, including the instrumentalities of such trade and commerce. Intraprovincial trade and commerce should remain under the jurisdiction of the Provincial Legislatures.

#### *Chapter 33—Income Controls*

96. In cases of national emergency, as defined by the Parliament of Canada, the Provinces should delegate to the Federal Parliament all additional powers necessary to control prices, wages and other forms of income, including rent, dividends and profits, to implement its prime responsibility for full employment and balanced economic growth.

#### *Chapter 34—Securities and Financial Institutions*

97. The matter of securities regulation, which has hitherto been under provincial jurisdiction, should become a concurrent jurisdiction with paramountcy in the Federal Parliament.

98. Where financial institutions (trust companies, insurance companies, finance companies, credit unions, caisses populaires) do business in more than one province, they should have to meet national standards as defined by the Federal Parliament; where they confine their activities to a single province, the Province should retain exclusive jurisdiction.

#### *Chapter 35—Competition*

99. The Federal Parliament ought to have a concurrent power with the Provincial Legislatures over competition in order that the regulation of unfair competition in all its aspects be subject to the national interest. In the event of conflicting legislation, the federal legislation should be paramount.

#### *Chapter 36—Air and Water Pollution*

100. Control over the pollution of air and water should be a matter of concurrent jurisdiction between the Provincial Legislatures and the Federal Parliament, and, as in section 95 of the British North America Act, the powers of the Federal Parliament should be paramount.

101. The concurrency of jurisdiction over the air and water pollution would necessitate both Federal-Provincial and Province-to-Province planning and co-ordination of programs.

102. We endorse the work of the Resources Ministers Council as a means of continuing consultation on matters of renewable resources.

#### *Chapter 37—Foreign Ownership and Canadian Independence*

103. The power of the Federal Parliament with respect to aliens should be clarified to ensure that Parliament has paramount power to deal with problems of foreign ownership.

104. The Federal Parliament should have the clear power to nationalize industry and expropriate land threatened by foreign takeovers or control contrary to the national interest.

105. The Federal Parliament should have jurisdiction over citizenship, and that power should include the power to promote national unity and a national spirit and to create institutions for these purposes.

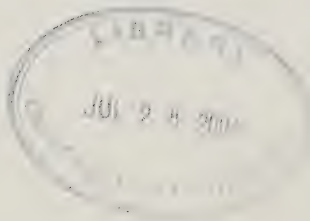
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BACKGROUND NOTES ON THE PATRIATION  
OF THE  
BRITISH NORTH AMERICA ACT

Prepared by the Federal-Provincial  
Relations Office, Ottawa, 9 April 1976.

BACKGROUND NOTES ON THE PATRIATION OF THE  
BRITISH NORTH AMERICA ACT

- I        ABSENCE OF A GENERAL AMENDING FORMULA IN 1867.
  
- II       THE CURRENT SITUATION WITH RESPECT TO  
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The British North America Act of 1867 was the fourth new constitution adopted by the British Parliament for "Canada" in the space of 93 years, following the Quebec Act of 1774, the Constitutional Act of 1791 and the Union Act of 1840.

The three colonies that were joined together in 1867 as four "provinces" had had internal self-government for some twenty years but there was no thought that they or the new "Canada" were or would be independent of Britain. It was consistent with the facts of the situation that the constitution was, like its predecessors, a statute of the British Parliament. If it did not work out (as its predecessors had not), it could be altered or completely replaced by the British Parliament. There was no precedent for an amending procedure for a British statute by a colony so the omission was not strange.

The British North America Act was not totally unamendable in Canada. There was no general amending formula and the Parliament of Canada was not empowered to modify its own constitution. However, a number of specific provisions of the Act bore a qualification such as: "Until the Parliament of Canada otherwise provides", "Unless altered by the Parliament of Canada", "Until the Legislature of Ontario or of Quebec otherwise provides" or "Until altered by the Lieutenant Governor in Council".



In addition section 92(1) of the Act provided that the Legislatures of the provinces might amend their own constitutions, except as regards the Office of Lieutenant Governor.

It was not until more than thirty years after the Canadian federation was begun that the next one was established in Australia in 1901. The concept of a "dominion" as something more self-governing and more independent than a colony gradually developed but it was not until the Balfour Report of 1926 that the principle was enunciated of the equality of status of Britain, Canada and the other countries that formed the new "Commonwealth". This principle was embodied in the Statute of Westminster of 1931, which provided for the independent status of the Commonwealth countries. As part of that independence, British legislation would no longer apply to a Dominion unless the Dominion asked that it should. Section 7 of the Statute of Westminster, however, excepted the British North America Acts, 1867 to 1930, from the general removal of Canada from British legislative authority because the governments of Canada and the provinces could not agree upon a formula for constitutional amendment.

As mentioned above, the British North America Act did specifically provide for the eventual alteration of certain provisions of the Act. In addition, the Legislatures of the provinces could amend their own constitutions except as regards the Office of Lieutenant Governor under section 92(1) of the British North America Act.

The British North America Act was amended in 1949 to grant to the Parliament of Canada the power to amend "the Constitution of Canada", with certain exceptions, under a new section 91(1). This was done pursuant to an Address passed by the two Houses of the Canadian Parliament without consultation with the provinces. The new section specifically reserves certain matters from the general authority of the Parliament of Canada to amend the constitution. Generally, those matters are:

- a) changes in the distribution of legislative authority;
- b) changes to the rights and privileges constitutionally granted to the Legislatures or governments of the provinces;
- c) the rights and privileges granted to any class of persons with respect to schools;
- d) the use of the English or of the French language;

- e) the requirement that there be at least one session of Parliament annually and that no House of Commons continue for more than five years from the day of the return of the Writs (except if not opposed by more than one third of the members of the House in time of war, invasion or insurrection).

If an amendment were required in these excepted areas, it was and remains necessary to ask the British Parliament to adopt the appropriate legislation. The areas covered by these exceptions are among the most important parts of the constitution.

### III

#### PREVIOUS ATTEMPTS TO "PATRIATE" THE BRITISH NORTH AMERICA ACT

The publication of the Balfour Report in 1926 opened the door for Canada to remove itself completely from the legislative authority of the British Parliament. The principal problem to be resolved was that of finding an amending formula for the British North America Act when "patriating" it.

1) The first attempt to solve the problem occurred in 1927 at a Dominion-Provincial Conference. The Conference examined an opinion submitted by the Minister of Justice, Ernest Lapointe, which involved patriation with a special amending formula. Agreement of all participants was not forthcoming and the matter was kept under consideration.

2) The second attempt to resolve the matter of "patriation" was at the Dominion-Provincial Conference held in April 1931, which was convened in response to representations by Ontario. Unable to obtain agreement on a special amending formula and conscious of the desire of the provinces to maintain their jurisdiction, Prime Minister Bennett introduced a resolution into the House of Commons on June 30th, 1931, subsequently approved by the Senate, and forwarded to London requesting that the British North America Acts, 1867-1930, be excepted from the terms of the proposed Statute of Westminster which would allow a Dominion to remove itself from the authority of British legislation.

3) The third attempt to deal with the matter occurred in January 1935, when the House of Commons established a Special Committee to enquire into the need to amend the British North America Act and the procedure for amendment. The Committee held ten sessions but did not propose a procedure for amendment in its report.

4) The fourth attempt originated in the Dominion-Provincial Conference of 1935 which established a sub-Conference on constitutional questions under the Chairmanship of the Minister of Justice, Ernest Lapointe. Following a recommendation of the sub-Conference, a Continuing Committee on Constitutional Questions was convened on January 28th, 1936. The Committee devised an amending formula incorporating elements of flexibility and entrenchment but it was not adopted.

5) The fifth attempt to deal with the matter was limited to the question of the power of the federal Parliament to amend the constitution of Canada, except for five protected categories (see No. 2: The current situation with respect to constitutional amendment). The federal Parliament unilaterally requested that the British Parliament pass the British North America Act 1949 (No. 2) which would grant this power to the Parliament of Canada under a new section 91(1). This was done.

6) The sixth attempt occurred in 1950, when a Constitutional Conference was convened in Ottawa in January and continued its work in Quebec City in September. It was subsequently suspended because of the Korean crisis and the work was not resumed.



7) A seventh attempt was inaugurated in July, 1960, at the Dominion-Provincial Conference in Ottawa. The Conference of Attorneys-General met four times during the succeeding fourteen months. At first the Minister of Justice, E.D. Fulton, suggested that the authority to amend the Constitution of Canada in all respects not now amendable in Canada be transferred to the Parliament of Canada subject to the consent of the Legislatures of all the provinces. It was generally felt however that a less rigid formula could be found. A formula was devised in November of 1961, but some differences of view remained and the plan was not carried through.

8) An eighth attempt began at the suggestion of Prime Minister Pearson in June 1964. Premier Manning of Alberta, on behalf of the Premiers, informed the Prime Minister of the belief that general agreement could be achieved on the basis of the 1961 proposal. At a Federal-Provincial Conference held in October, 1964, a modified version of the 1961 proposal was approved in principle, but subsequently it failed to get unanimous support and consideration was postponed indefinitely.

9) A ninth attempt began with the Federal-Provincial Conference of February, 1968, which became a continuing Constitutional Conference. The Constitutional Conference, with its various committees of ministers and officials and its sub-committees, operated from 1968 until the Victoria Charter was presented at Victoria in June, 1971. The Charter provided for a "patriation" procedure, an amending formula to which all governments there represented agreed, and a number of changes in substantive areas, as well as for the modernization of the constitution. Quebec was not prepared to proceed with the full Charter and action was suspended.

At a dinner attended by the First Ministers on April 9th, 1975, the Prime Minister of Canada proposed that they should proceed at an early date to "patriation" of the British North America Act on the basis of the amending formula agreed to at Victoria in 1971 for those parts of the constitution which cannot now be amended in Canada. He suggested that this should be done without reopening, at that time, any substantive questions of constitutional revision. Those would be left for action after the amending procedure had been established and the constitution had been "patriated".

#### Procedure for "Patriation"

The procedure for "patriation" discussed in February, 1971, contemplated three main steps: approval by the Legislatures of the provinces and by both Houses of Parliament; legislation by the British Parliament and, finally, the issue of a Proclamation by the Governor General. The legislation by the British Parliament would provide the legal validity for the Canadian proclamation and its provisions about the procedure of amendment. It would also provide that no future British law should have application to Canada and would make consequential repeal or amendment of British statutes affecting the Canadian constitution. The issuance of the proclamation by the Governor General would coincide with the effective date of the British legislation. Once all this had been done, one would have full and complete capacity to deal with the constitution in Canada.

The Victoria Amending Formula

The amending formula approved at Victoria (less Articles 53, 54 and 55 which would constitute substantive amendments of the BNA Act), basically provided that the Legislative Assembly of a Province or either the Senate or the House of Commons could initiate a resolution for amendment of the constitution. If the amendment applied to one or more, but not all of the provinces, it might be made when authorized by resolutions of the Senate and House of Commons and the Legislative Assembly of each province concerned. For other amendments, the amendment would have to be authorized by resolutions of the Senate and House of Commons and by the Legislative Assemblies of a majority of the provinces including:

- i) any province that had, at any time prior to the proclamation according to any previous general census, a population of at least twenty five per cent of the population of Canada,
- ii) of at least two of the Atlantic provinces and,
- iii) of at least two of the Western provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.

If the Senate, under either formula, did not pass a resolution within ninety days of a resolution being passed by the House of Commons, the House of Commons could pass

the resolution again after the expiry of ninety days and thus authorize the Governor General on behalf of the Parliament of Canada to issue a proclamation.

The amending formula had been approved at the Victoria Conference without the dissent of any province. It was because of that general agreement that the Prime Minister hoped it could be re-affirmed and made the basis of early agreement on "patriation".

On the occasion of the discussion in April, 1975, the Premier of Quebec indicated that his province could not agree to "patriation" on the basis proposed without cultural guarantees. In the course of subsequent discussions other First Ministers suggested further additions to "patriation" plus the amending formula. These included the parts of the Victoria Charter concerning the Supreme Court and regional disparities. Some Western First Ministers queried the population qualification in the amending formula for Western provinces. No such qualification applies to the Atlantic provinces.

If all provincial governments agree to the amending formula (with or without the population qualification for the Western provinces), to appropriate cultural guarantees, to the provisions respecting the Supreme Court and to the provisions respecting regional disparities, one could proceed towards "patriation" according to the procedure outlined in February, 1971. This is the solution that is proposed by the federal government.

(a)    Simple "patriation"

      (i) Description

1.        The British Parliament would be requested to pass a statute ending its capacity to legislate in any way with respect to Canada.
2.        Canada would thus be put in the same position that other self-governing members of the Commonwealth (Australia, New Zealand, etc.) have been in since 1931 - since the passing of the Statute of Westminster.
3.        At the same time provisions would be made that, until agreement on an amending formula is reached by the federal and provincial governments, an interim formula could be used. That interim formula would apply only to those parts of the Canadian Constitution which are not now amendable in Canada. It would provide that amendments to those parts of the Constitution would be made when Parliament and all the provincial legislatures agreed to the amendment. It would then be possible for all amendments to the Canadian Constitution to be carried out in Canada entirely by Canadian governments.
4.        Discussions between the federal and provincial governments about the redistribution of legislative powers, and other substantive changes to the Constitution could proceed in the future, as and when time is available. When agreement was finally reached, it could be implemented in Canada without going to the United Kingdom to ask for an amendment by the British Parliament.



(ii) History

5. Proceeding to patriate the Constitution before settling on a final amending formula is not a new suggestion. It was suggested by the Hon. E.D. Fulton, Minister of Justice, in October, 1960 to the Constitutional Conference of Attorneys-General. The suggestion was not adopted because it was believed that an amending formula acceptable to all governments, would be found at once.

The procedure was suggested by some provinces during the course of the Constitutional Review in September, 1970. Again it was set aside because it was thought that the unanimous consent of all governments to a comprehensive amending formula would soon be forthcoming.

(iii) Effect

6. There is, of course, a chance of never getting anything but unanimity as an amending formula. This is equally a possibility now. Indeed, some provinces have strongly argued that there is now a convention that amendments should not or cannot be sought relating to the distribution of powers and other matters of direct concern to them without the consent of all.

It could therefore be argued that, basically, the effect of an interim amending formula of unanimous consent would be simply to substitute a domestic rule of unanimity for one focussed on London.

7. The interim amending formula of unanimous consent will only apply to those parts of our Constitution that are not now amendable in Canada. That is, to matters that either do not relate to the constitution of the provinces and, therefore, are amendable by the provinces under section 92(1) of the B.N.A. Act or that

are not amendable by Parliament under section 91(1) of the B.N.A. Act.

Most of these are matters which concern all governments (e.g., the distribution of legislative powers) and, therefore, would under existing practice require unanimous consent for amendment.

(b) Patriation with a "sleeping" formula

(i) Description

8. Under this option, as with the case of simple patriation, the British Parliament would be asked to pass a statute to end its capacity to legislate for Canada. The amending formula agreed upon at Victoria would be added to apply only to those parts of the Constitution not now amendable in Canada. It would remain inoperative until all provincial legislatures had agreed that it be adopted. In the meantime, until the Victoria formula became fully operative, the interim formula of unanimous consent could be used if any changes were needed.

9. The Victoria formula provides that amendments to the Constitution which apply to one or more of the provinces may be made when Parliament and the legislatures of the provinces affected agree. Amendments to the Constitution which affect all governments may be made when Parliament and the legislatures of a majority of the provinces agree. That majority must include: any province that has 25 per cent of the population of Canada (presently Ontario and Quebec); at least two of the Atlantic provinces and at least two of the Western provinces.

10. The requirement that provinces having 25 per cent of the population must agree to an amendment means that any

province which has had at any time in its history 25 per cent of the population of Canada will have a veto power and will retain that veto power even though its population might at some future time drop below 25 per cent.

11.           The requirement that two of the Western provinces must agree includes the requirement that those two provinces must comprise at least 50 per cent of the population of all the Western provinces. At the present time, no two Prairie provinces alone contain 50 per cent of the western population, although the three together exceed that figure. Subject to population developments in the future, the population of British Columbia might exceed 50 per cent of the population of the four Western provinces, in which case it would, under the Victoria formula, have a veto even if it did not contain 25 per cent of the population of Canada. It has been suggested that the Western provinces should be on the same footing as the Atlantic provinces and that the consent of any two of those provinces should be sufficient to approve an amendment.

12.           The Prime Minister refers to this suggestion in his letter. The revision is acceptable to the federal government. The Prime Minister suggests it is a matter for discussion by the Premiers of the Western provinces.

(ii)   Effect

13.           The Victoria formula would not, under the second option referred to in the Prime Minister's letter, become operative until the legislatures of all provinces had signified their approval of that formula. Approval could be signified by a resolution of the provincial legislature, or perhaps by an Act of the provincial legislature.

Some provinces might signify their approval immediately, others might not do so for some time. But eventually, when all had agreed the formula worked out at Victoria would be established.

(iii) Difference between option (a) and (b)

14. Option (b) begins the process of getting a comprehensive and flexible amending formula incorporated into the Constitution. In the Address seeking legislation by the British Parliament under this option, the Parliament of Canada would express its approval of the amending formula. It would, thus, be on its way to establishment forthwith.

15. The Special Joint Committee of the Senate and House of Commons in its Report in 1972 on the Constitution of Canada stated that it was unlikely that the Victoria formula could be improved upon, no matter how long future intergovernmental negotiations were carried on.

16. As would be the case under option (a) the only change to the Constitution as it presently exists would be the addition of an amending formula for those parts of the Constitution not now amendable in Canada. It would not disturb or alter existing federal and provincial powers.

(c) Patriation with a "sleeping" proclamation

17. The third option referred to in the Prime Minister's letter is the same as the second option mentioned by him, except that instead of having only the Victoria amending formula incorporated as a "sleeping" part of our Constitution, other substantive provisions would be added as sleeping parts as well. One suggestion as to the kinds of substantive provisions that might be added in this way are those set out in the attachment to the Prime Minister's letter.

1. There is ample precedent for the federal government seeking amendments of the Canadian Constitution (B.N.A. Act) without consultation of the provinces.

There was no consultation in the case of eight of the fourteen major amendments thus far:

- 1871 - establishment of new provinces
- 1875 - privileges and immunities of the House of Commons
- 1886 - representation of the territories in the House of Commons
- 1915 - redefinition of senatorial divisions
- 1943 - postponement of redistribution
- 1946 - readjustment of representation in the House of Commons
- 1949 - entry of Newfoundland
- 1949(2) - establishment of the amending power of Parliament (section 91(1)).

2. It is not unusual for the federal government to seek and obtain a constitutional amendment from Westminster despite the opposition of some of the provinces.

- (a) In 1907 the federal government obtained an amendment to the B.N.A. Act increasing federal subsidies to the provinces. All provinces, except British Columbia, agreed to the proposed amendment. The amendment was obtained despite British Columbia's objections.
- (b) In 1943 an amendment was sought to suspend until after the war the redistribution of seats in the House of Commons. The amendment was sought and obtained despite Quebec's objection.
- (c) In 1946 an amendment to section 51 of the B.N.A. Act changing the representation in the House of Commons was sought. Quebec objected. The amendment was granted.



- (d) Twice in 1949 amendments to the B.N.A. Act were obtained despite provincial objection. One amended section 91 of the B.N.A. Act to give Parliament legislative authority to amend the Constitution of Canada with certain important exceptions. The other admitted Newfoundland into Confederation. In both cases the amendments were sought and obtained without consultation with the provinces despite provincial claims that the provinces should have been consulted and their consent sought.

3. It is abundantly clear that the federal government and only the federal government can request amendments to the Constitution from Westminster.

- (a) In 1868 a Nova Scotian delegation sought the withdrawal of Nova Scotia from Confederation. They were referred back to Ottawa by the British Secretary for the Colonies.
- (b) In 1874 British Columbia carried to Westminster a petition relating to non-performance of the terms on which that colony had entered Confederation. The province was rebuffed.
- (c) In 1877 Prince Edward Island appealed unsuccessfully for British intervention.
- (d) In 1886 Prince Edward Island protested against non-compliance with the terms of entry into Union. The Colonial Secretary declined to advise the Queen.
- (e) In 1887 New Brunswick, Nova Scotia, Ontario, Quebec and Manitoba unanimously agreed upon 18 resolutions proposing amendments to the B.N.A. Act. No action was taken by the British government.

(1) In 1907 and 1943 (above) formal protests were made by provinces to proposed amendments to the Constitution.

4. The Statute of Westminster presently provides that the British North America Act will be amended by the U.K. Parliament. Precedent indicates that the U.K. Parliament will act only in response to a voice representing the country as a whole and that voice is the voice of the federal Parliament. It is the representatives in the federal Parliament of the residents of a province that speak for them on federal matters.

5. The provinces have no legal right to be consulted about a proposed amendment to the Constitution sought from Westminster. However, the federal government has in the past recognized the desirability of consulting the provinces before requesting certain kinds of amendments.

6. It has recognized that there is a political (conventional) obligation to consult the provinces when a proposed amendment involves a transfer of provincial legislative power.

7. Unilateral patriation would not alter in any way the distribution of legislative powers, nor would it disturb or alter in any way existing rights of the provincial governments or of the provincial legislatures.

8. The fact that a province says it is concerned or interested, and demands consultation or claims that its consent is necessary does not determine whether in fact their rights are affected. There have been such assertions or demands in the past, as in 1943, 1946 and 1949. In all cases, the federal government and Parliament have made their determination as to what it has seemed appropriate to do.

- 1) No decisions have been made as to the details of the mechanism to be used for patriating the Constitution should the government decide to recommend to Parliament that this be done unilaterally; nor have the advantages and disadvantages of alternative procedures yet been discussed.
- 2) Patriation would involve, at least:
  - (a) a joint Address from both Houses of Parliament to the Queen by way of Joint Resolution of the Senate and House of Commons, asking the Queen to have the Parliament at Westminster enact a statute to amend the Statute of Westminster, 1931 and the British North America Act, 1867 and
  - (b) an appropriate U.K. statute.
- 3) The U.K. statute would amend or repeal, as appropriate, those sections of the Statute of Westminster, 1931 which presently preserve to the U.K. Parliament authority to enact legislation relating to Canada (sections 4 and 7). It would also contain provisions stating that no future laws of that Parliament shall apply to Canada ( a self-denying ordinance).
- 4) Provision would also be made in or under the authority of the U.K. Statute for an amending procedure whereby those parts of the B.N.A. Act and related constitutional documents which are not now amendable in Canada could be amended (ie., one of the Prime Minister's three options). There are two main mechanisms that might be used to

accomplish this:

- (a) First, the text of such an amending procedure could be set out in the text of the U.K. statute. (This was the procedure contemplated in the Constitutional Conferences during the 1960's which culminated with the "Fulton-Favreau" amending proposal.)
  - (b) Alternately, the U.K. statute might merely authorize the new amending procedure, the text of which would be set out in a Proclamation issued by the Governor General under the Great Seal of Canada. (This was the procedure worked out during the Constitutional Review process of 1968-71 which culminated in the "Victoria" Conference.)
- 5) If the second alternative above is chosen, the U.K. statute would contain a section providing that the B.N.A. Acts and related constitutional documents will be repealed as U.K. statutes upon issuance by the Governor General of his Proclamation. That Proclamation would contain a provision declaring those documents to be part of that Proclamation and upon its issuance they would become Canadian constitutional documents.
- 6) The British North America Act, 1867 and related constitutional documents would not become statutes of the federal Parliament.
- 7) They would become Canadian constitutional documents amendable only with the consent of the federal Parliament and/or provincial legislatures as the case might be.

VIII      BACKGROUND INFORMATION ON THE ATTACHMENT  
TO THE PRIME MINISTER'S LETTER

1.          The document was developed as a result of informal discussions with the provinces which occurred between April, 1975 and November, 1975.
2.          It lists provisions which various Premiers asked to have included in any patriation action, including Mr. Bourassa's request for "cultural guarantees".
3.          It is a working paper only, not approved by any government.
4.          The document consists of selected provisions of what is known as the Victoria Charter (with modifications), together with two new sections and a preamble. The Victoria Charter is the Canadian Constitutional Charter developed by the federal and provincial governments during their constitutional discussions of 1968-71. Those discussions culminated in the Constitutional Conference of Federal and Provincial First Ministers, in June of 1971, in Victoria, at which the Charter was finalized and hence its name.

Cultural Guarantees

5.          The two sections in the attachment that do not have their origin in the Victoria Charter are Articles 38 and 40 (Part IV and Part VI of the attachment).
6.          Article 38 is a "guarantee" designed to meet the request by the Province of Quebec for "constitutional guarantees" for the French language and culture. The objective was to devise a formula which would afford such



a guarantee without affecting provincial powers or the distribution of powers generally. The concern expressed by the Province of Quebec and others has related to the minority position of Canadians of French language and culture and the need for protection against action by the federal government and Parliament in which the majority is and will be English-speaking. The purpose of Article 38 is, thus, to protect the French language and culture against adverse action by the Parliament and Government of Canada.

7. This kind of guarantee is not unlike provisions in the Constitutions of other countries to limit the powers of a legislature or a government in order to protect the citizens of the country in certain respects that are considered to be fundamental. There are some provisions in the "Bill of Rights" clauses in the Constitution of the United States. The First Amendment to the Constitution of that country states that Congress can make no law prohibiting the free exercise of religion, abridging the freedom of speech or of the press, or the right to freedom of peaceable assembly.

8. It is not unlike the provisions, with respect to political rights, that the federal and provincial governments considered appropriate to include in Canada's Constitution as part of the Victoria Charter in 1971.

Article 2 of the Charter stated that no law of the Parliament of Canada or the legislatures of the provinces should abrogate freedom of thought, conscience or religion, freedom of opinion and expression, and freedom of peaceful assembly and association. This would have placed limitations on the power of Parliament and the legislatures.

9. Section 40 is the other completely new section of the document. It is designed to indicate the spirit in which governments may enter into agreements. It was developed in consultation with representatives of the Province of Quebec and relates especially to areas that could have a relevance to the French language and culture.

#### Amending Formula

10. The rest of the document has its origin in the Victoria Charter. Part I sets out the amending formula. It is the amending formula agreed to at Victoria but made applicable only to those parts of the Constitution not now amendable in Canada.

Article 1 of the Proclamation corresponds to Article 49 of the Victoria Charter, Article 2 to Article 50, Article 3 to Article 51, Article 4 to Article 52, Article 5 corresponds to Article 56, and Article 7 to Article 57.

Articles 53, 54 and 55 of the Victoria Charter are not included because those sections were designed to replace the existing amending authority of Parliament under section 91(1), and that of the provincial legislatures under section 92(1) of the British North America Act. Part I of the document is drafted on the basis that existing powers under sections 91(1) and 92(1) of the B.N.A. Act are unaltered. This was the basis on which the Premiers agreed in April, 1975 to see if a plan could be worked out to achieve "patriation" with an amending formula along the lines of that agreed to at Victoria.

#### Supreme Court

11. Part II of the document would entrench the Supreme Court in the Constitution and give the provinces

a say in the appointment of its judges. It is included because many Premiers indicated that they considered it desirable that such provisions become part of our Constitution.

At present the Supreme Court is not "entrenched" in our Constitution. It owes its existence, independence and structure to a federal statute.

12. The provisions in Part II of the document were agreed to by the federal and provincial governments at Victoria in 1971. They correspond exactly to Part IV of the Victoria Charter.

13. Under the proposal there would be no change in the present operation of the Supreme Court. By tradition three judges are appointed to the Supreme Court from Quebec, three from Ontario, one from the Atlantic Region, and two from the West.

The document contemplates, as did the Victoria Charter, that this present informal custom of regional representation will be continued. Article 11 which provides that three judges must be appointed from the Bar of the Province of Quebec would entrench in the Constitution what already exists in practice.

14. Article 25, which corresponds to Article 39 of the Victoria Charter, gives special protection to the civil law as one of the two systems of law in Canada.

It provides that a majority of civil law judges must sit on cases where only questions of civil law are involved.

15. Part II of the document would change the existing system with respect to the Supreme Court in that its

adoption would give the provinces a voice in the selection of appointees to the Supreme Court.

At present the selection and appointment of Supreme Court judges is solely within the discretion of the federal government. The procedure set out in Part II, and agreed to at Victoria, requires the Attorney General of Canada (i.e., the federal Minister of Justice) to consult the Attorney General of the province where a prospective appointee to the Supreme Court has practiced law before making the appointment.

16. If the Attorney General of the province and the Attorney General of Canada do not agree on the prospective appointment a nominating procedure would be put in motion.

17. Under this procedure the Attorney General of the province would have the right to choose either of two types of nominating council. One type would consist of the federal Minister of Justice and ten provincial Attorneys General; the other type would consist of the federal Minister of Justice, the provincial Attorney General involved, and a chairman selected by both of them.

18. When the nominating council has been selected the federal Minister of Justice must nominate at least three persons as potential appointees to fill the Supreme Court vacancy in question. He would submit their names to the nominating council for selection by it of the appointee.

#### Language Rights

19. Part III of the document is a modified version of the Language Rights provisions agreed to in the Victoria Charter. It provides that the federal government

guarantee rights to English and French services in federal administrative, judicial and legislative areas.

20. It would not change the existing situation as it exists by virtue of the Official Languages Act. But, the guarantees established by that Act would become entrenched in the Constitution, and not owe their existence solely to a federal statute.

21. The Victoria Charter (Articles 10 to 19) contained language provisions respecting the rights to English and French language services in some provincial administrative, judicial and legislative areas. The document does not include references to provinces because the basis of the present approach was to avoid getting into substantive issues relating to provincial powers or arrangements.

22. Part III sets out a mechanism whereby provinces will be able now or in future to assume obligations, similar to those undertaken by the federal government, if they desire. This is an "opting-in" formula that was agreed to at Victoria. It leaves to each province the right to be as bilingual as it wants.

23. Once a province opts in to commitments on bilingualism, however, it cannot get out of these commitments without some difficulty, because of a "locking-in mechanism". That is, once a province has committed itself to protecting the language rights of minorities, it could not cease to do so without an amendment to the Constitution.

#### Regional Disparities

24. Part V of the document was Part VII of the Victoria Charter. Some minor differences in the wording of the two



sections occurs solely for drafting reasons.

25. This section was added to the document because during the informal discussions some provincial Premiers indicated that it was important to them that the provision be included.

26. The significance of the section is that it constitutes a constitutional enunciation of a principle and a standing reminder to the richer areas of the country that there are poorer areas. It does not legally obligate any government to specific action but it would make equality of opportunity and well-being a moral obligation.

12. Les dispositions du titre II du document ont été approuvées par les gouvernements fédéral et provinciaux à Victoria, en 1971. Elles correspondent exactement au titre IV de la Charte de Victoria.

13. La proposition n'entraînerait aucun changement dans le fonctionnement actuel de la Cour suprême. La coutume veut que parmi les juges nommés à la Cour suprême, trois viennent du Québec, trois de l'Ontario, un de la région atlantique et deux de l'Ouest.

Le document, tout comme la Charte de Victoria, préconise le maintien du mode de représentation régionale actuellement en vigueur. L'article 11, qui porte que trois juges doivent être choisis au sein du barreau de la province de Québec, ferait entériner par la constitution ce qui existe déjà dans la pratique.

14. L'article 25, qui correspond à l'article 39 de la Charte de Victoria, accorde une protection spéciale au droit civil, qui est l'un des deux systèmes de droit en vigueur au Canada.

Cet article stipule que les affaires ne portant que sur des questions de droit civil doivent être entendues par une majorité de juges de droit civil.

15. Le titre II du document modifierait le régime existant, en ce qui a trait à la Cour suprême, en ce sens qu'il donnerait aux provinces la possibilité de participer à la sélection des candidats à la magistrature de la Cour suprême.

Pour le moment, la sélection et la nomination des juges de la Cour suprême sont laissées à l'entière discrétion du gouvernement fédéral. La procédure énoncée au titre II et approuvée à Victoria exige que le procureur général du Canada (autrement dit, le ministre de la Justice), avant de faire une nomination, consulte le procureur général de la province où le candidat éventuel à la Cour suprême a exercé dans le domaine du droit.

16. Lorsque le procureur général de la province intéressée et le procureur général du Canada ne peuvent pas s'entendre sur le choix du candidat, la convocation d'un collège qui recommande la nomination d'un candidat est demandée.
17. Conformément à cette procédure, le procureur général de la province a le choix entre la convocation de l'un des deux collèges suivants: un collège composé du ministre fédéral de la Justice et de dix procureurs généraux des provinces, ou un collège composé du ministre fédéral de la Justice, du procureur général de la province intéressée et d'un président choisi par ces deux procureurs.
18. Lorsqu'un collège est constitué, le ministre fédéral de la Justice doit nommer au moins trois personnes à titre de candidats éventuels au poste vacant à la Cour suprême. Il soumet leurs noms au collège, qui procède au choix du candidat.

Les droits linguistiques

19. Le titre III du document est une version modifiée des dispositions visant les droits linguistiques se trouvant dans la Charte de Victoria. Il stipule que le gouvernement fédéral garantit le droit à des services, en français et en anglais, dans tous les domaines administratifs, juridiques et législatifs fédéraux.
20. Ces dispositions ne modifieraient en rien la situation actuelle prévue par la Loi sur les langues officielles. Mais les garanties reconnues par ladite Loi seraient intégrées à la constitution et ne dépendraient plus uniquement, pour leur existence, d'une simple loi fédérale.
21. La Charte de Victoria (articles 10 à 19) contenait des dispositions relatives au droit d'obtenir des services, en français et en anglais, dans certains domaines administratifs, juridiques et législatifs provinciaux. Le présent document ne fait aucune référence aux provinces, puisque la base de la présente approche est d'éviter d'aborder des questions de fond concernant les pouvoirs ou les décisions des provinces.
22. Le titre III est une procédure selon laquelle chaque province pourra, si elle le désire, maintenant ou plus tard, assumer des responsabilités semblables à celles du gouvernement fédéral. Il s'agit d'une formule avec "option d'assujettissement" approuvée à Victoria. Celle-ci permet à chaque province d'être bilingue dans la mesure où la province elle-même le désire.

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CANADA

PRIME MINISTER · PREMIER MINISTRE

Letters from the Prime Minister to the  
Premiers of the Provinces concerning  
"Patriation" of the BNA Act with attachments.

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Lettres du Premier ministre aux premiers  
ministres des provinces au sujet du  
rapatriement de l'AANB et documents annexés.





(Same letter sent to Premier Schreyer, Premier Hatfield, Premier Moores, Premier Regan, Premier Davis, Premier Campbell, Premier Blakeney.)

Ottawa K1A 0A2

March 31, 1976

My dear Premier:

I had been hoping to be in touch with you well before this to advise you about progress in the exercise we started last April, with our discussion at 7 Rideau Gate, for "patriation" of the B.N.A. Act. Since then, all of you, with the exception of Premier Bennett, have received Mr. Gordon Robertson who has discussed the project with you on my behalf. Those discussions took place between May and mid-July of 1975. Premier Barrett was unable to arrange a meeting prior to the election in British Columbia but Mr. Robertson will be meeting Premier Bennett in early April. Discussions with Quebec have taken a good deal of time and it was not until March 5th that I had the opportunity of reviewing the question with the Premier of Quebec. I thought it essential to know his attitude before proceeding to further action.

You will recall that we started with agreement in principle on the desirability of "patriating" the B.N.A. Act and, at the same time, establishing as law the amending procedure that had been agreed to in Victoria in 1971. We also agreed that we would not, in the present "patriation"

The Honourable Peter Lougheed,  
Premier of Alberta,  
Legislative Building,  
Edmonton, Alberta.

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exercise, consider substantive changes to the B.N.A. Act itself since any entry on that course would, as the discussions from 1968 to 1971 had shown, make early action impossible. Mr. Bourassa indicated, however, that it would be difficult for his government to agree to this, unless the action also included "constitutional guarantees" for the French language and culture. We agreed that our general acceptance of the plan, in principle, would be subject to more precise exploration and definition, and this was the purpose of the discussions Mr. Robertson had with you on my behalf. I should first report on what developed in the course of those discussions, although the Premiers Mr. Robertson saw later will be generally aware of the way in which our original proposal grew.

It quickly became apparent in Mr. Robertson's discussions that the action for "patriation" and establishment of the amending procedure would be more meaningful for, and more acceptable to, a number of provinces if certain other alterations in our constitutional situation could be established at the same time. Most of these alterations, with the exception of Mr. Bourassa's "constitutional guarantees", were among the things that had been included in the Victoria Charter. They included the provision for consultation with the provinces about appointments to the Supreme Court of Canada and the special handling of cases arising from the civil law of Quebec. They included also the provision concerning the reduction of regional disparities. Certain of the western provinces wanted to have the amending procedure itself modified so that the requirement with regard to consent from the four

western provinces would be the same as that for the four eastern provinces. This would mean deletion of the population provision respecting the western provinces that was inserted at Victoria.

The main problem was the definition of the "constitutional guarantees" to which Mr. Bourassa had referred at the outset. Mr. Robertson found that the Premiers he spoke to after the initial discussions with Mr. Bourassa in May had no objection in principle to "constitutional guarantees", although all made it clear that they would want to consider them in detail once they had been worked out with Quebec and reduced to writing.

I will not go into all the difficulties that are presented by the concept of "constitutional guarantees"; they are many and complex. Discussions with Mr. Bourassa's representatives finally led to a formulation that was included in a document sent to him in November, 1975. I am enclosing a copy of the full document herewith. I would draw your attention especially to Parts IV and VI. The formulation of the principal "constitutional guarantee" is Part IV (Article 38). It is buttressed by Part VI (Article 40) and also by the provisions concerning language in Part III.

As I have mentioned, the "constitutional guarantee" was a concept raised by Mr. Bourassa and stated by him to be essential. Articles 38 and 40 attempt to cover the points made by his representatives. Mr. Bourassa knows that my colleagues and I share some concern about the Articles, and he understands that it will fall to him to explain them to his fellow Premiers, in the light of the facts relating to the position of the French language and culture in Canada.

I should emphasize that the document, while it is styled a "Draft Proclamation", was put in this form simply to show with maximum clarity what the result would be if all the proposals, as they had emerged in the course of Mr. Robertson's consultations, were found acceptable by all governments. It should not be regarded as a specific proposal or draft to which anyone is committed at this stage, since there has not been agreement to the totality of it by anyone. It is rather in the nature of a report on the various ideas, including Mr. Bourassa's "constitutional guarantee", as they developed in the course of the informal discussions from April to November, 1975.

As I stated earlier, most of the "Draft Proclamation" consists of provisions of the Victoria Charter which various Premiers have asked to have included in any action we take. In some cases there are adjustments of the Victoria provisions in order to take into account altered circumstances since 1971 and to benefit by some hind-sight. The new parts of this "report" are the Parts IV and VI to which I have already referred. For ease of reference the main elements are:

- (a) A Preamble. This is entirely new and is simply an idea of the way a total presentation might look.
- (b) Part I is the amending formula contained in the Victoria Charter made applicable to those parts of the Constitution not now amendable in Canada. Thus Articles 49, 50, 51, 52, 56 and 57 of Part IX of the Victoria Charter are included, while Articles 53, 54 and 55, which were designed to replace Articles 91(1) and 92(1) of the British North



America Act, are not. The amending formula has not been modified to take account of the views expressed by certain Western Premiers concerning the population qualification for agreement by the Western provinces. I suggest that this might be a matter that, in the first instance, the four Western Premiers might attempt to solve among themselves.

- (c) Part II, which is Part IV of the Victoria Charter concerning the Supreme Court, with a final Article (included in another Part of the Victoria Charter) to protect the status of Judges already appointed.
- (d) Part III, which is a modified version of Part II of the Victoria Charter concerning language rights. It would entrench the constitutional status of the English and French languages federally. It would not affect the provinces, but it would permit a province, under Article 35, to entrench its own provision if it so wished.
- (e) Part IV, which is the "guarantee" designed to protect the French language and culture against adverse action by the Parliament and Government of Canada.
- (f) Part V, which is essentially Part VII of the Victoria Charter on Regional Disparities. The presentation has been slightly altered but there is no change in substance whatever.

- (g) Part VI, which is a new Article designed to indicate the spirit in which Governments may enter into agreements. In two of the three areas specifically mentioned, major agreements with Quebec have been concluded over the past two years (family allowances and consultation on immigration).

Mr. Bourassa advised me in our conversation on March 5th that the things he considers to be necessary might well go beyond what we, in the federal government, have understood to be involved in the present exercise. In part they might relate to the distribution of powers. I advised him that the Government of Canada, for its part, feels that it can go no further as part of this exercise than the constitutional guarantees that are embodied in the document and that indeed even they might find difficulty of acceptance in their present form. To go further would involve entry upon the distribution of powers, with the consequences to which I have referred. We must, then, consider three alternatives that are open to us in these circumstances.

Let us begin with the simplest alternative. The Government of Canada remains firmly of the view that we should, as a minimum, achieve "patriation" of the B.N.A. Act. It is not prepared to contemplate the continuation of the anomalous situation in which the British Parliament retains the power to legislate with respect to essential parts of the constitution of Canada. Such "patriation" could be achieved by means of an Address of the two Houses of the Canadian Parliament to the Queen, requesting appropriate legislation by the British Parliament to end its capacity to legislate in any way with respect to Canada.

Whereas unanimity of the federal government and the provinces would be desirable even for so limited a measure, we are satisfied that such action by the Parliament of Canada does not require the consent of the provinces and would be entirely proper since it would not affect in any way the distribution of powers. In other words, the termination of the British capacity to legislate for Canada would not in any way alter the position as between Parliament and the provincial legislatures whether in respect of jurisdictions flowing from Sections 91 and 92 or otherwise.

However, simple "patriation" would not equip us with an amending procedure for those parts of our constitution that do not come under either Section 91(1) or Section 92(1) of the B.N.A. Act. To meet this deficiency, one could provide in the Address to the Queen that amendment of those parts of the constitution not now amendable in Canada could be made on unanimous consent of Parliament and the legislatures until a permanent formula is found and established. In theory this approach would introduce a rigidity which does not now exist, since at present it is the federal Parliament alone which goes to Westminster, and the degree of consultation of or consent by the provinces is a matter only of convention about which there can be differences of view. In practice, of course, the federal government has in the past sought the unanimous consent of the provinces before seeking amendments that have affected the distribution of powers.

A second and perhaps preferable alternative would be to include in the action a provision that could lead to the establishment of a permanent and more flexible amending procedure. That could be done by detailing such a procedure in our Joint

Address and having it included in the British legislation as an enabling provision that would come into effect when and only when it had received the formal approval of the legislatures of all the provinces. The obvious amending procedure to set forth would be the one agreed to at Victoria in application to those parts of our constitution not now amendable in Canada (Part I of the attached "Draft Proclamation"). This could be with or without modification respecting the four western provinces. (On this last point, the federal government would be quite prepared to accept the proposed modification and it is my understanding that the other provinces would equally agree if the western provinces can arrive at agreement.)

If we took the above step, we would achieve forthwith half of our objective of last April - "patriation" - and we would establish a process by which the other half - the amending procedure - would become effective as and when the provincial legislatures individually signify their agreement. Over a period of time, which I hope would not be long, we would establish the total capacity to amend our constitution under what is clearly the best and most acceptable procedure that has been worked out in nearly fifty years of effort, since the original federal-provincial conference on this subject in 1927. Until full agreement and implementation had been achieved, any constitutional changes that might be needed, and which did not come under Section 91(1) or Section 92(1) or which could not otherwise be effected in Canada could be made subject to unanimous consent. This would impose an interim rigidity for such very rare requirements for amendment, but, as I have said, the practice has, in any event, been to secure unanimous consent before making amendments that have affected the distribution of powers.

A third and more extensive possibility still, would be to include, in the "patriation" action, the entirety of the "Draft Proclamation" I am enclosing. In other words the British Parliament, in terminating its capacity to legislate for Canada, could provide that all of the substance of Parts I to VI would come into effect in Canada and would have full legal force when, and only when, the entirety of those Parts had been approved by the legislatures of all the provinces. At that point, we would have, not only "patriation" and the amending procedure, but also the other provisions that have developed out of the discussions thus far. Here again, of course, until all the Provinces had approved the entire Draft Proclamation, any constitutional change which did not come under Section 91(1) or Section 92(1) would be subject to unanimous consent.

As you can see, there are several possibilities as to the course of action now to take. So far as the federal government is concerned, our much preferred course would be to act in unison with all the provinces. "Patriation" is such a historic milestone that it would be ideal if all Premiers would associate themselves with it.

But if unanimity does not appear possible, the federal government will have to decide whether it will recommend to Parliament that a Joint Address be passed seeking "patriation" of the B.N.A. Act. A question for decision then will be what to add to that action. We are inclined to think that it should, at the minimum, be the amending procedure agreed to at Victoria by all the provinces, with or without modification respecting the western provinces, and subject to the condition about coming into force only when approved by the legislatures of all the provinces as explained above.

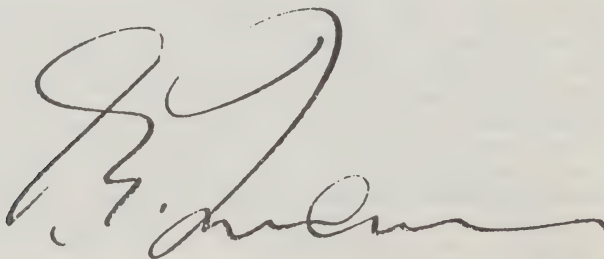


The implications of the different possibilities are complex, and you will undoubtedly want to consider them with care. To facilitate consideration, Mr. Robertson would be glad to come to see you, at a convenient time, for such discussions as you might wish to have. When opportunity offers at an early meeting, we might also discuss the matter together.

I would welcome your comments. Mr. Robertson will be in touch with your office to see if you would wish to have a meeting with him and, if so, what time would suit.

Prior to my meeting with Mr. Bourassa, I did not feel that I was in a position to place any documents before Parliament, but I now feel it proper to do so. I would like to table copies of this letter, as well as of the "Draft Proclamation" that is enclosed. If you have any objection, could you please advise me forthwith. If I do not hear to the contrary, I shall plan to table on April 9th. Should you wish to do the same in your legislature, I would of course, have no objection.

Sincerely,

A large, stylized handwritten signature in dark ink, appearing to read "B. J. Mulroney". The signature is written in a cursive style with a large, looping initial "B".



translation

PRIME MINISTER · PREMIER MINISTRE

OTTAWA, KIA 0A6  
March 31, 1976

My dear Premier,

As I told you on March 5th, I did not want to speak to the other Premiers about our discussions on the subject of "patriation" of the British North America Act before getting a clearer idea of your feelings. I have sent them a letter today of which you will find attached a copy in English and French.

All of the letters are identical, except for the one I sent to Mr. Bennett in which I took account of the fact that he had not attended our meeting in April 1975 and that Mr. Robertson has not yet had the opportunity of meeting with him. I trust you will find that the letters represent the facts accurately. Please let me know if you have any objection to my placing the attached letter to the Premiers and the draft proclamation before Parliament on April 9th. It is understood that I would have no objection to you doing the same thing in Quebec.

Sincerely,

(signed) P.E. Trudeau

The Honourable Robert Bourassa  
Premier of Quebec  
Parliament Buildings  
Quebec City, Quebec



November 10th, 1975.

Form for a Proclamation  
of the Governor General

Whereas it is fitting that it should be possible to amend the Constitution of Canada in all respects by action of the appropriate instrumentalities of government in Canada acting separately or in concert as may best suit the matter in question;

And whereas it is desirable to make more specific provision respecting the constitutional status of the English and French languages in Canada and to ensure that changes in the Constitution, interpretation of its provisions or action by the Parliament or Government of Canada should not endanger the continuation and full development of the French language and the culture based thereon;

And whereas it is desirable that the Parliament and Government of Canada and the Legislatures and Governments of the Provinces act effectively to promote equality of opportunity and an acceptable level of public services among the different regions of Canada;

Therefore it is desirable to establish among other things:

- (a) A method for the amendment in Canada of those parts of the Constitution of general interest and concern that cannot now be amended in Canada in which the consent will be required of the Legislatures of Provinces representative of both the official language groups of Canada as well as of the Legislatures of Provinces in all of the geographical regions of Canada;
- (b) means by which Provinces can participate in the selection of persons to be appointed to the Supreme Court of Canada; and
- (c) principles to guide the Parliament of Canada in the exercise of powers allotted to it under the Constitution of Canada and to guide the Government of Canada in the exercise of powers conferred upon it by the Constitution of Canada and by laws enacted by the Parliament of Canada;

Now therefore We ..... do proclaim  
as follows:

Part I

Amendments to the Constitution

Art. 1 Amendments to the Constitution of Canada may from time to time be made by Proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes:

- (1) every Province that at any time before the issue of such Proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;

- (2) at least two of the Atlantic Provinces;
- (3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

Art. 2 Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by Proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

Art. 3 An amendment may be made by Proclamation under Articles 1 or 2 without a resolution of the Senate authorizing the issue of the Proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.

Art. 4 The following rules apply to the procedures for amendment described in Articles 1 and 2:

- (1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;
- (2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a Proclamation authorized by it.

Art. 5 The procedures prescribed in Articles 1 and 2 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but the procedure in Article 1 may nonetheless be used to amend any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 6 In this Part "Atlantic Provinces" means the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and "Western Provinces" means the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Art. 7 The enactments set out in the Schedule shall continue as law in Canada and as such shall, together with this Proclamation and any Proclamation subsequently issued under this Part, collectively be known as the Constitution of Canada, and amendments thereto shall henceforth be made only according to the authority contained therein.

#### Part II

#### Supreme Court of Canada

Art. 8 There shall be a general court of appeal for Canada to be known as the Supreme Court of Canada.

Art. 9 The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada, and eight other judges, who shall, subject to this Part, be appointed by the Governor General in Council by letters patent under the Great Seal of Canada.



Art. 10 ...Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the Bar of any Province, has, for a total period of at least ten years, been a judge of any court in Canada or a barrister or advocate at the Bar of any Province.

Art. 11 At least three of the judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the Bar of the Province of Quebec, have, for a total period of at least ten years, been judges of any court of that Province or of a court established by the Parliament of Canada or barristers or advocates at that Bar.

Art. 12 Where a vacancy arises in the Supreme Court of Canada and the Attorney General of Canada is considering a person for appointment to fill the vacancy, he shall inform the Attorney General of the appropriate Province.

Art. 13 When an appointment is one falling within Article 11 or the Attorney General of Canada has determined that the appointment shall be made from among persons who have been admitted to the Bar of a specific Province, he shall make all reasonable efforts to reach agreement with the Attorney General of the appropriate Province, before a person is appointed to the Court.

Art. 14 No person shall be appointed to the Supreme Court of Canada unless the Attorney General of Canada and the Attorney General of the appropriate Province agree to the appointment, or such person has been recommended for appointment to the Court by a nominating council described in Article 16, or has been selected by the Attorney General of Canada under Article 16.

Art. 15 Where after the lapse of ninety days from the day a vacancy arises in the Supreme Court of Canada, the Attorney General of Canada and the Attorney General of a Province have not reached agreement on a person to be appointed to fill the vacancy, the Attorney General of Canada may inform the Attorney General of the appropriate Province in writing that he proposes to convene a nominating council to recommend an appointment.

Art. 16 Within thirty days of the day when the Attorney General of Canada has written the Attorney General of the Province that he proposes to convene a nominating council, the Attorney General of the Province may inform the Attorney General of Canada in writing that he selects either of the following types of nominating councils:

- (1) a nominating council consisting of the following members: the Attorney General of Canada or his nominee and the Attorneys General of the Provinces or their nominees;
- (2) a nominating council consisting of the following members: the Attorney General of Canada or his nominee, the Attorney General of the appropriate Province or his nominee and a Chairman to be selected by the two Attorneys General, and if within six months from the expiration of the thirty days they cannot agree on a Chairman, then the Chief Justice of the appropriate Province, or if he is unable to act, the next senior Judge of his court, shall name a Chairman;

and if the Attorney General of the Province fails to make a selection within the thirty days above referred to, the Attorney General of Canada may select the person to be appointed.

Art. 17 When a nominating council has been created, the Attorney General of Canada shall submit the names of not less than three qualified persons to it about whom he has sought the agreement of the Attorney General of the appropriate Province to the appointment, and the nominating council shall recommend therefrom a person for appointment to the Supreme Court of Canada; a majority of the members of a council constitutes a quorum, and a recommendation of a majority of the members at a meeting constitutes a recommendation of the council.

Art. 18 For the purpose of Articles 12 to 17 "appropriate Province" means, in the case of a person being considered for appointment to the Supreme Court of Canada in compliance with Article 11, the Province of Quebec, and in the case of any other person being so considered, the Province to the Bar of which such a person was admitted, and if a person was admitted to the Bar of more than one Province, the Province with the Bar of which the person has, in the opinion of the Attorney General of Canada, the closest connection.

Art. 19 Articles 12 to 18 do not apply to the appointment of the Chief Justice of Canada when such appointment is made from among the judges of the Supreme Court of Canada.

Art. 20 The judges of the Supreme Court of Canada hold office during good behaviour until attaining the age of seventy years, but are removable by the Governor General on address of the Senate and House of Commons.

Art. 21 The Supreme Court of Canada has jurisdiction to hear and determine appeals on any constitutional question from any judgment of any court in Canada and from any decision on any constitutional question by any such court in determining any question referred to it, but except as regards appeals from the highest court of final resort in a Province, the Supreme Court of Canada may prescribe such exceptions and conditions to the exercise of such jurisdiction as may be authorized by the Parliament of Canada.

Art. 22 Subject to this Part, the Supreme Court of Canada shall have such further appellate jurisdiction as the Parliament of Canada may prescribe.

Art. 23 The Parliament of Canada may make laws conferring original jurisdiction on the Supreme Court of Canada in respect of such matters in relation of the laws of Canada as may be prescribed by the Parliament of Canada, and authorizing the reference of questions of law or fact to the court and requiring the court to hear and determine the questions.

Art. 24 Subject to this Part, the judgment of the Supreme Court of Canada in all cases is final and conclusive.

Art. 25 Where a case before the Supreme Court of Canada involves questions of law relating to the civil law of the Province of Quebec, and involves no other question of law, it shall be heard by a panel of five judges, or with the consent of the parties, four judges, at least three of whom have the qualifications described in Article 11, and if for any reason

three judges of the court who have such qualifications are not available, the court may name such ad hoc judges as may be necessary to hear the case from among the judges who have such qualifications serving on a superior court of record established by the law of Canada or of a superior court of appeal of the Province of Quebec.

Art. 26 Nothing in this Part shall be construed as restricting the power existing at the commencement of this Proclamation of a Provincial Legislature to provide for or limit appeals pursuant to its power to legislate in relation to the administration of justice in the Province.

Art. 27 The salaries, allowances and pension of the judges of the Supreme Court of Canada shall be fixed and provided by the Parliament of Canada.

Art. 28 Subject to this Part, the Parliament of Canada may make laws to provide for the organization and maintenance of the Supreme Court of Canada, including the establishment of a quorum for particular purposes.

Art. 29 The court existing on the day of the coming into force of this Proclamation under the name of the Supreme Court of Canada shall continue as the Supreme Court of Canada, and the judges thereof shall continue in office as though appointed under this Part except that they shall hold office during good behaviour until attaining the age of seventy-five years, and until otherwise provided pursuant to the provisions of this Part, all laws pertaining to the court in force on that day shall continue, subject to the provisions of this Proclamation.

### Part III

#### Language Rights

Art. 30 English and French are the official languages of Canada, but no provision in this Part shall derogate from any right, privilege, or obligation existing under any other provision of the Constitution.

Art. 31 A person has the right to use English and French in the debates of the Parliament of Canada.

Art. 32 The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes are authoritative.

Art. 33 A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada and any courts established by the Parliament of Canada, and to require that all documents and judgments issuing from such courts be in English or French.

Art. 34 An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada.

Art. 35 A provincial Legislative Assembly may, by resolution, declare that provisions similar to those of any part of Articles 32, 33 and 34 shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts apply to the Legislative Assembly, courts and offices specified according to the terms of the resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure prescribed in Article 2.

Art. 36 A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 37 In addition to the rights provided by this Part, the Parliament of Canada may, within its legislative jurisdiction, provide for more extensive use of English and French.

#### Part IV

##### Protection of the French Language and Culture

Art. 38 The Parliament of Canada, in the exercise of powers allotted to it under the Constitution of Canada, and the Government of Canada, in the exercise of powers conferred upon it by the Constitution of Canada and by laws enacted by the Parliament of Canada, shall be guided by, among other considerations for the welfare and advantage of the people of Canada, the knowledge that a fundamental purpose underlying the federation of Canada is to ensure the preservation and the full development of the French language and the culture based on it and neither the Parliament nor the Government of Canada, in the exercise of their respective powers, shall act in a manner that will adversely affect the preservation and development of the French language and the culture based on it.

#### Part V

##### Regional Disparities

Art. 39 Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers, the Parliament of Canada and the Legislatures of the Provinces, together with the Government of Canada and the Governments of the Provinces, are committed to:

- (a) the promotion of equality of opportunity and well-being for all individuals in Canada;
- (b) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
- (c) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Part VI

Federal-Provincial Agreements

Art. 40(1) In order to ensure a greater harmony of action by governments, and especially in order to reduce the possibility of action that could adversely affect the preservation and development in Canada of the French language and the culture based on it, the Government of Canada and the Governments of the Provinces or of any one or more of the Provinces may, within the limits of the powers otherwise accorded to each of them respectively by law, enter into agreements with one another concerning the manner of exercise of such powers, particularly in the fields of immigration, communications and social policy.

(2) Nothing in this Article shall be held to limit or restrict any authority conferred either before or after the coming into force of this Proclamation upon the Government of Canada or the Government of a Province to enter into agreements within the limits of the powers otherwise accorded to it by law.



## SCHEDULE

This Schedule is NOT final,  
subject to confirmation.

### Enactments

British North  
America Act, 1867,  
30-31 Vict., c. 3  
(U.K.).

An Act to amend and  
continue the Act 32  
and 33 Victoria  
chapter 3; and to  
establish and provide  
for the Government of  
the Province of  
Manitoba, 1870, 33  
Vict., c. 3 (Can.).

Order of Her Majesty  
in Council admitting  
British Columbia  
into the Union, dated  
the 16th day of May  
1871.

British North  
America Act, 1871,  
34-35 Vict., c. 28  
(U.K.), and all acts  
enacted under  
section 3 thereof.

Order of Her Majesty  
in Council admitting  
Prince Edward Island  
into the Union,  
dated the 26th day  
of June, 1873.

Parliament of  
Canada Act, 1875,  
38-39 Vict.,  
c. 38 (U.K.).

Order of Her Majesty  
in Council admitting  
all British posses-  
sions and  
Territories in North  
America and islands  
adjacent thereto into  
the Union, dated the  
31st day of July,  
1880.

Enactments

British North  
America Act, 1886,  
49-50 Vict., c. 35  
(U.K.).

Canada (Ontario  
Boundary) Act,  
1889, 52-53  
Vict., c. 28  
(U.S.).

Canadian Speaker  
(Appointment of  
Deputy) Act, 1895,  
Session 2, 59 Vict.,  
c. 3 (U.K.).

Alberta Act, 1905,  
4-5 Edw. VII, c. 3  
(Can.).

Saskatchewan Act,  
1905, 4-5 Edw. VII,  
c. 42 (Can.).

British North  
America Act, 1907,  
7 Edw. VII, c. 11  
(U.K.).

British North  
America Act, 1915,  
5-6 Geo. V, c. 45  
(U.K.).

British North  
America Act, 1930,  
20-21 Geo. V, c. 26  
(U.K.).

Statute of West-  
minster, 1931, 22  
Geo. V, c. 4 (U.K.)  
in so far as it  
applies to Canada.

British North  
America Act, 1940,  
3-4 Geo. VI, c. 36  
(U.K.).

British North  
America Act, 1943,  
7 Geo. VI, c. 30  
(U.K.).

British North  
America Act, 1946,  
10 Geo. VI, c. 63  
(U.K.).

Enactments

British North  
America Act, 1949,  
12 and 13 Geo. VI,  
c. 22 (U.K.).

British North  
America (No. 2) Act,  
1949, 13 Geo.  
VI, c. 81 (U.K.)

British North  
America Act, R.S.C.,  
1952, c. 304 (Can.).

British North  
America Act, 1960,  
9 Eliz. II, c. 2  
(U.K.).

British North  
America Act, 1964,  
12 and 13, Eliz. II,  
c. 73 (U.K.).

British North  
America Act, 1965,  
14 Eliz. II, c. 4,  
Part I, (Can.).



THE PREMIER OF ALBERTA

403/427-2251

Legislative Building  
Edmonton, Alberta, Canada

T5K 2B7

14 October 1976



The Right Honourable Pierre E. Trudeau  
Prime Minister of Canada  
House of Commons  
OTTAWA, Ontario

My dear Prime Minister:

Further to my letter of September 2, 1976 and my telex of October 4, 1976, I wish to inform you of the outcome of the deliberations by the ten Canadian Premiers on the issues raised by you in your letter of March 31, 1976 relative to patriation of the Constitution from Westminster to Canada.

Your letter of March 31, 1976 outlined three possible options and served as a framework for our deliberations. The provinces agreed in May 1976 to proceed with an examination of all three options. You will recall that your option 3 includes patriation, an amending formula and a number of other substantive changes to the British North America Act which were contained in the draft proclamation appended to your letter of March 31, 1976. You will also recall that when the premiers had private discussions on this matter at your residence during the evening of June 14, 1976, you indicated that you would be prepared to accept any proposal which had been unanimously agreed to by the provinces.

At the same time, you indicated that you hoped we could consider the matter over the summer and report to you early in the fall as to the outcome of our deliberations and discussions.

As Chairman of the Annual Conference of Premiers, I would like to now deal with the matters as they were outlined in your letter of March 31, 1976.

### Patriation

All provinces agreed with the objective of patriation. They also agreed that patriation should not be undertaken without a consensus being developed on an expansion of the role of the provinces and/or jurisdiction in the following areas: culture, communications, Supreme Court of Canada, spending power, Senate representation and regional disparities. Later in the letter I will endeavour to give you some idea of our discussions on the above matters.

### Amending Formula

Considerable time was spent on this important subject and the unanimous agreement of the provinces was not secured on a specific formula. Eight provinces agreed to the amending formula as drafted in Victoria in 1971 and as proposed by you in your draft proclamation. British Columbia wishes to have the Victoria Formula modified to reflect its view that British Columbia should be treated as a distinct entity with its own separate veto. In this sense it would be in the same position as Ontario and Quebec. Alberta held to the view that a constitutional amending formula should not permit an amendment that would take away rights, proprietary interests and jurisdiction from any province without the concurrence of that province. In this regard, Alberta was referring to matters arising under Section 92, 93 and 109 of the British North America Act.

### Matters Unanimously Agreed To

A number of matters were dealt with and unanimously agreed to. Specific texts were considered and given approval, subject to revision by draftsmen.

- a) A greater degree of provincial involvement in immigration.
- b) A confirmation of the language rights of English and French generally along the lines discussed in Victoria in 1971.
- c) A strengthening of jurisdiction of provincial governments of taxation in the areas of primary production from lands, mines, minerals and forests.
- d) A provision that the declaratory powers of the federal government to declare a particular work for the general advantage of Canada would only be exercised when the province affected concurred.
- e) That a conference composed of the eleven First Ministers of Canada should be held at least once a year as a constitutional requirement.
- f) That the creation of new provinces should be subject to any amending formula consensus.



As already mentioned under the remarks on patriation, the provinces were of the view that while patriation was desirable it should be accompanied by the expansion of provincial jurisdiction and involvement in certain areas. The Premiers believed that discussions on these matters should be held with the federal government because they involve the federal government to a significant degree.

- a) Culture - You will recall that culture was referred to in Parts IV and VI of the draft proclamation. The interprovincial discussions on culture focused on the addition of a new concurrent power to be included in the Constitution. This power would refer to arts, literature and cultural heritage and would be subject to provincial paramountcy. On this matter, there was a high degree of consensus on the principle and considerable progress was made with respect to a solution. There was also, however, firm opinion from one province that the provinces and the federal government should have concurrent jurisdictional powers in the area.
- b) Communications - In the draft proclamation, communications was referred to in Part VI. Discussions on this subject related to greater provincial control in communications, particularly in the area of cable television.
- c) Supreme Court of Canada - In general, discussions on this topic developed from those articles found in Part II of the draft proclamation. The provinces unanimously agreed to a greater role for the provinces in the appointment of Supreme Court judges than provided for in the draft proclamation. In addition, a number of other modifications were suggested to the provisions found in the draft proclamation.
- d) Spending Power - Discussion on this matter focused on the necessity and desirability of having a consensus mechanism which must be applied before the federal government could exercise its spending power in areas of provincial jurisdiction.
- e) Senate Representation - Discussion on this subject related to British Columbia's proposal that Senate representation for that province be increased.
- f) Regional Disparities and Equalization - In the draft proclamation, Regional Disparities was referred to in Part V. The discussions on this topic focussed on the expansion and strengthening of this section to include a reference to equalization. There was unanimous agreement on the clause contained in the draft proclamation and a high degree of consensus on incorporating clauses in the Constitution providing for equalization.

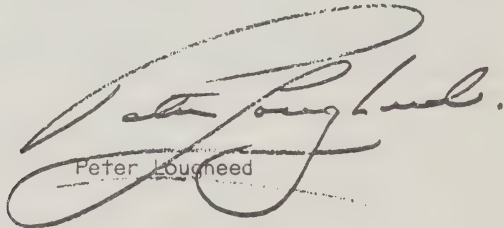
14 October 1976

Other matters were discussed, but it was felt by the Premiers that their deliberations had been of a preliminary and exploratory nature. As such, in any future meeting it is possible that individual provinces may present additional suggestions for consideration.

The Premiers were of the view that significant progress on this complex matter had occurred. It was felt that further progress would require discussions between the provinces and the federal government. It was concluded by the Premiers that the next step should be for you to meet with the Premiers and develop the discussions reflected in this letter. The Premiers felt that it would now be appropriate for them to accept your invitation for further discussions in the near future, at a mutually agreeable time.

Given the importance of this subject and the reference to it in your Throne Speech of October 12, 1976, the other Premiers may wish to join with me in tabling this letter before our respective provincial legislatures or otherwise making this letter public on October 20, 1976. If you have any objection could you please advise me forthwith.

Yours truly,



Peter Lougheed

PL/ww

cc. Honourable William Bennett  
Honourable Allan Blakeney  
Honourable Edward Schreyer  
Honourable William Davis  
Honourable Robert Bourassa  
Honourable Frank Moores  
Honourable Gerald Regan  
Honourable Alex Campbell  
Honourable Richard Hatfield



PRIME MINISTER OF CANADA

Ottawa K1A 0A2,  
January 19th, 1977.

JAN 19 1977

My dear Premier:

I was glad to have the occasion, presented by my dinner with you and the Premiers of the other provinces on December 13th, to discuss briefly your letter of October 14th reporting on the discussions of the Premiers in August and October, 1976, on "patriation" of the constitution. I told you then - and this seemed to be agreeable to the other Premiers - that I would be replying to your letter, further to the interim reply I sent on October 18th, to round out this particular part of our constitutional discussions.

It seems to me that the results of the meetings of Premiers, as reflected in your letter, are, in a sense, either too much or too little. They are too much in relation to the limited exercise we embarked upon in April, 1975. That, as reflected in my letter of April 19th, 1975, was intended to accomplish "patriation" of our constitution from Britain with the amending clause agreed on at Victoria.

The Honourable Peter Lougheed,  
Premier of Alberta,  
Legislative Building,  
Edmonton, Alberta.  
T5K 2B7

We - the provinces and the federal government - decided deliberately to avoid the complexities of constitutional reform which had been so clearly demonstrated in the conferences, meetings and discussions from 1968 to 1971. While the very limited scope of our exercise grew somewhat in the course of discussions in 1975 and early 1976, the proposals embodied in your letter carry the exercise into new areas and even raise some aspects of the distribution of powers. This is precisely the sort of thing we had, in April 1975, sought to avoid.

If the proposals in your letter are too much in relation to the immediate exercise, they are too little in relation to constitutional reform. We got into many other aspects of the constitution in 1968-1971 and, if we are now to embark on changes in the distribution of powers and other fundamental matters, I think our review and our changes should be much more extensive than those covered in your letter of October 14th. I have made it clear on many occasions that the federal government is prepared to re-embark on a fundamental review of our constitution. We would be quite prepared to have such a process begin at a very early date if that is the general wish. The exercise since April 1975 has been based on experience, over the many years of effort in this area, which seemed to demonstrate the wisdom of trying to proceed by stages: first to "patriate" with an amending procedure that most think satisfactory; then to decide upon the changes in a document that would be totally Canadian and totally amendable by procedures to be executed entirely in Canada. The federal government is prepared to proceed by either route: action by stages, such as we have been concentrating on, or action all at once by fundamental constitutional revision.

Having said that the proposals in your letter are, in our judgment, either too much or too little, the federal government is prepared to see if agreement can be achieved on the basis of your letter, but with modifications, so that "patriation" can be effected as soon as possible. The most significant modification we would suggest is that we should not, if we are to adhere to this limited exercise, enter in any way into the distribution of powers. The federal government is quite ready to go into that problem but it is both complex and difficult. To do it partially, in the way your letter suggests, without a coherent total plan would, in our view, be a serious mistake. We have, therefore, tried to see what might reasonably be done to meet the concerns to which your letter refers, while leaving all matters of constitutional powers for comprehensive study and action at the second stage, after "patriation". So that there can be no possibility of misunderstanding I repeat that, if the provinces now feel that this is not the right course, the federal government is ready to embark on the other route of total constitutional review. If we adopt that course, it will be essential for all of us to be willing to meet the challenge that this task will pose in as open-minded a way as possible consistent with our responsibilities, unburdened by commitments to any preconceived outcome, and constrained only by the dictates of our sense of what will best serve the interests of Canadians in all parts of Canada. In this spirit, I am convinced, lies the greatest promise of a constitution that will be Canadian in the best sense, that is to say an institutional framework for our future that will be effective and workable, yet justly and sensitively balanced as between its constituent elements. Having made these points, I return to the possibility of action in stages, with a first stage built upon the proposals in your letter.



If "patriation" can be agreed upon using the discussions of the last two years as the basis, we will need to implement it by means of a Proclamation by the Governor General and legislation by the British Parliament to terminate its powers to legislate with regard to Canada. A draft of such a Proclamation was sent to you and the other Premiers with my letter of March 31st, 1976. It has seemed to us that it might advance matters if the proposals of the federal government, in reply to your letter of October 14th, were communicated in the form of a revised Proclamation. Such a document is enclosed herewith as part of a draft of a resolution that might be placed before Parliament. The limitations on what it contains relate in large part to the comments I have already made that it would be unwise, in this limited exercise, to touch the distribution of powers. Apart from that broad comment, possibly it would be helpful if I were to make the following brief explanations concerning the different parts of the document.

#### Part I - Amendments to the constitution

This sets forth the Victoria amending formula. While the formula may not be perfect, there is general agreement that it is the best that has been devised in nearly fifty years of effort. It was agreed to by all eleven governments in 1971 and by eight of the ten provinces at your meeting in Toronto last October. We are never likely to get a higher degree of consensus on any formula. Accordingly, while the federal government is not entirely satisfied about one or two aspects of the formula, it seems to us that the wise course would be to accept it and get ahead with "patriation" on the basis of it. If we ever get anything that has a higher level of consensus, it can be established by use of the Victoria formula.

## Part II - Senate Representation

This is entirely new and represents a response to the view that the western part of Canada is much under-represented in the Senate at the present time. While Senate representation has never been directly related to population in Canada, but rather to regions, it is clear that the west is indeed under-represented when one considers the way in which its importance in confederation has grown since the present Senate membership was set in 1915. Various formulae can be devised for increased representation from the western provinces. Part II represents a suggestion that the federal government would support.

When we come to fundamental review of the constitution, we will want to consider many things relating to the Senate. The federal government will have a number of proposals to make. For purposes of the present exercise, however, we would be prepared to have early decision on modification of western representation since that seems clearly to be unsatisfactory and capable of correction at this stage.

## Part III - Language Rights

Your letter includes, as one of the matters "unanimously agreed to" by the provinces in the 1976 meetings, "a confirmation of the language rights of English and French generally along the lines discussed in Victoria in 1971". The Victoria provisions included certain obligations that specific provinces then agreed they were prepared to accept with regard to the official language that is in a minority position within its boundaries. We are not at all certain whether the wording of your letter indicates that those provinces are now prepared to accept the same or similar obligations. The federal government is prepared

to do so. Articles 14 to 20 in the enclosed draft are along the lines of Victoria but, in view of the uncertainty to which I refer, they are in this text made applicable to the Parliament and government of Canada only, with a provision like that contained in the Victoria Charter (Article 19 here) whereby a province can adopt similar provisions and give them constitutional status if it so wishes. If provinces would be prepared, as at Victoria, to have obligations inserted in the various articles with respect to themselves that would, of course, strengthen the provisions. I hope that is the sort of possibility to which your letter refers.

Article 21 was not a part of the Victoria proposals. It is a modification of Article 38 in the draft I sent you on March 31st, 1976. I understand that a number of the Premiers were concerned at the indefiniteness of the reference to "culture" and "development" in the earlier Article. Article 21 is limited to language and preservation of it. It applies to federal powers only. The provinces could be included in such a provision or the possibility could be contemplated by a modification of Article 19. Such a thing might give the degree of assurance to linguistic minorities in some provinces that we feel Article 21 will give to the linguistic minority nationally.

#### Part IV - Regional Disparities

Your letter says the meetings of Premiers produced "unanimous agreement on the clause contained in the draft proclamation". It also says there was "a high degree of consensus on incorporating clauses in the constitution providing for equalization". Article 22 reproduces the article that met with unanimous agreement. Part (b) of it was, as you know, designed as a constitutional commitment to the objective of equalization as now developed.

Part V - Federal-Provincial Consultation

Article 23 would provide the "constitutional requirement" so which your letter refers that a conference of First Ministers "be held at least once a year".

Article 24 would provide for consultation at such a conference before a new province was established. The federal government is of the view that to require the use of the amending procedure to establish a new province, as your letter suggests, might prove a source of rigidity. The admission of new provinces would not, of course, affect in any way the specific requirements in the proposed amending formula for the degree of consent required among the existing provinces for any future constitutional change. Nor would what is proposed affect the existing provision that the boundaries of a province cannot be altered without the consent of its Legislature.

Article 25 would require consultation before any use of the declaratory power of the federal Parliament. A requirement for provincial consent, as your letter suggests, would be tantamount to changing the division of legislative powers. As I have already said, we feel that any entry upon the distribution of powers is too fundamental a matter for the present exercise. Such a change could be considered following "patriation" as a part of a total review.

Article 26 is a substantial and structured constitutional obligation to consultation in the areas referred to. Your letter referred to a desire for "a greater degree of provincial involvement in immigration", which is now a concurrent power with federal paramountcy under Section 95 of the B.N.A. Act.

Your letter also refers to "a new concurrent power" in relation to culture and to "greater provincial control in communications". These comments all appear to suggest changes in the distribution of powers. As I have said, the federal government considers such changes to be proper material for consideration at the second stage of our constitutional reform if we are to proceed by stages. For this stage, we would suggest that an obligation to consult along the lines of that in Article 26 would provide a new measure of assurance that provincial interests would be taken into account to the greatest possible degree before the federal government or Parliament acted within federal constitutional powers in these areas. This would not, of course, preclude any changes in the relevant powers that might be agreed upon in the second stage. They could be brought into effect under the amending procedure.

#### Part VI - Miscellaneous

Article 37 would remedy a deficiency in our constitution as it now stands: the lack of an official French-language text with full force and effect. It would be critically important that such a text should be approved by a means acceptable to all and therefore the approval mechanism has for the time being been left blank. One possibility is that a small group of eminent jurists might be appointed to review the French-language versions to ensure complete accuracy before they become law.

#### Draft British legislation

This is along the lines discussed in the meetings preparatory to the Victoria Conference. It would provide the legal base for the Proclamation and would terminate the power of the British Parliament to legislate with respect to Canada.

The only parts of your letter to which I have not referred are those relating to the Supreme Court of Canada, the "jurisdiction of provincial governments of taxation in the areas of primary production" and the exercise of the federal spending power. With regard to the last two, both get into the distribution of powers. As I have already indicated, the federal government considers that this is a matter for extensive and full discussion after "patriation" if we are following the course of action by stages.

So far as the Supreme Court of Canada is concerned, the Victoria Charter contained a number of specific articles dealing with the procedure to be followed in making appointments to the Court. They would have given the provinces a limited but explicit role in the appointment process. In your letter you indicated that, at the October meeting, the provincial Premiers agreed that the provinces should have a greater role in this process than was accorded to them by the Victoria provisions, although your letter does not detail what that greater role should be. You said that "a number of other modifications were suggested" to the Victoria provisions.

The federal government, for its part, has also had some second thoughts about the articles agreed to at Victoria. We reached the conclusion that they appear to have sufficiently adverse implications for the Supreme Court, as a vital institution of our federation, that they ought not simply to be reintroduced as part of this current proposal without at least a very careful re-examination of those implications by all of our governments. We also concluded that it would be possible to achieve a better regional distribution of the judges, as well as more effective consultation, through a constitutional provision that would require selection of the judges on a geographical



basis. This would ensure that a regional distribution is invariably present on the Court. It would, of course, retain and guarantee constitutionally the presence on the Court of at least three judges experienced in the civil law of Quebec. We would welcome the views of the Premiers on a new provision of this kind, combined with a constitutional obligation to consult with the Attorney General of the province or provinces concerned before an appointment was made.

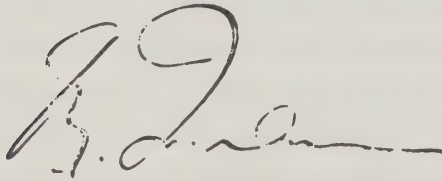
I am sending copies of this letter to your fellow Premiers so they may be aware of these proposals that the federal government is making in response to your letter and the meetings of August and October, 1976. As I have said, we would be happy to see "patriation" effected forthwith on the basis of the draft proclamation and legislation I am enclosing, to which could be added provisions about the Supreme Court if there is agreement on them. If it seems likely that that result could be achieved after a further conference to discuss modifications that any of the Premiers might think desirable, I would be happy to join in such a conference at a mutually convenient date.

It is quite possible, however, that the areas of disagreement may be various and perhaps substantial. If so, I cannot help wondering whether it would not be better to return to our original plan of April 1975 - nothing but "patriation" with the Victoria amending formula - leaving everything else for discussion and action at the next stage, after "patriation". You will have noted that Premiers Schreyer and Campbell in their letters to me of October 21st and November 10th made clear that they do not consider that "patriation" need be conditional upon a consensus with regard to the matters referred to in your letter.

I should appreciate your comments on the proposals in this letter and particularly your suggestion as to what the next stage ought to be in order to complete the "patriation" exercise that we have now been working on for nearly two years. I am asking the Premiers of the other provinces for their comments and suggestions in the same way. I do hope that we can achieve "patriation", with the Victoria amending formula, without much more delay and bring to an end this remnant of our colonial condition of a century ago.

As our correspondence in October was made public forthwith, I would think that the same ought to be done with this letter and the brief covering letters I am sending to the Premiers of the other provinces. I would propose, therefore, to make them public on Friday next, January 21st, and to table the letters in the House of Commons when it resumes its session on January 24th, 1977.

Sincerely,





DRAFT RESOLUTION RESPECTING  
THE CONSTITUTION OF CANADA

WHEREAS it is in accord with the status of Canada as an independent state that the Canadian people should be able through their chosen representatives to provide for themselves the means by which to alter their own Constitution in all respects.

And whereas hitherto certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

And whereas it is desirable that it should be possible to amend the Constitution of Canada in all respects by action of the appropriate instrumentalities of government in Canada;

And whereas the Proclamation hereinafter referred to embodies provisions with respect to the Constitution of Canada and the means whereby it may hereafter be amended;

Be it therefore resolved that we, [the Senate] and [House of Commons] approve the promulgation of a Proclamation by the Governor General, to have the force of law as well in Canada as in the United Kingdom, in the following terms:

"Proclamation respecting the Constitution of Canada

PART I - AMENDMENTS TO THE CONSTITUTION

Art. 1 Amendments to the Constitution of Canada may be made from time to time by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolution of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the provinces that includes:

- (1) every province that at any time before the issue of such Proclamation had, according to any previous general census, a population of at least 25 per cent of the population of Canada;
- (2) two or more of the Atlantic provinces; and
- (3) two or more of the Western provinces that have, according to the then latest general census, combined populations of at least 50 per cent of the population of all the Western provinces.

Art. 2 Notwithstanding paragraph (3) of Article 1, when the Legislative Assemblies of each of the Western provinces have, either before or after the coming into force of this Part, by resolution so authorized, that paragraph shall read as follows:

"(3) two or more of the Western provinces."

Art. 3 Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the provinces may be made from time to time by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each province to which such amendments apply.

Art. 4 An amendment may be made by proclamation under Article 1 or Article 3 without a resolution of the Senate authorizing the issue of the proclamation if within 90 days of the passage by the House of Commons of a resolution authorizing its issue the Senate has

not passed such a resolution and at any time after the expiration of those 90 days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing those 90 days.

Art. 5 The following rules apply to the procedures for amendment described in Articles 1 and 3:

- (1) either of such procedures may be initiated by the Senate or House of Commons or the Legislative Assembly of a province; and
- (2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Art. 6 The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive government of Canada or the Senate or House of Commons.

Art. 7 In each province the legislature may exclusively make laws in relation to the amendment from time to time of the constitution of the province.

Art. 8 Notwithstanding Articles 6 and 7, amendments to the Constitution of Canada in relation to the following matters may be made only in accordance with the procedure described in Article 1:

- (1) the offices of the Queen, the Governor General or the Lieutenant Governor of a province;
- (2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada or the Legislature of a province;
- (3) the maximum period fixed by the Constitution of Canada for the duration of the House of



Commons or the Legislative Assembly of a province;

- (4) the powers of the Senate;
- (5) the number of members by which a province is entitled to be represented in the Senate, and the residence qualifications of Senators;
- (6) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province;
- (7) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; and
- (8) the requirements respecting the use of the English or French language.

Art. 9 The procedure described in Article 1 may not be used to make an amendment where there is another provision for making such amendment in the Constitution of Canada, but that procedure may none the less be used to amend any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 10 In this Part, "Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and "Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Art. 11 Class 1 of section 91 and class 1 of section 92 of the British North America Act, 1867, as amended by the British North America (No. 2) Act, 1949 are repealed on the coming into force of this Part.

PART II - SENATE REPRESENTATION

Art. 12        Notwithstanding anything in the Constitution of  
Canada or in Article 8,

- (a) the number of Senators provided for under  
section 21 of the British North America Act,  
1867, as amended, is increased from one  
hundred and four to one hundred and sixteen;
- (b) the maximum number of Senators is increased  
from one hundred and twelve to one hundred  
and twenty-four;
- (c) the portion of the first sentence following  
paragraph 2 of section 22 of the British North  
America Act, 1867, as amended, shall read as  
follows:

"3. The Atlantic Provinces of Nova  
Scotia, New Brunswick, Prince  
Edward Island and Newfoundland;

4. The Western Provinces of Manitoba,  
British Columbia, Saskatchewan  
and Alberta;

which Four Divisions shall (subject to  
the Provisions of this Act) be represented  
in the Senate as follows: Ontario by  
twenty-four Senators; Quebec by twenty-  
four Senators; the Atlantic Provinces  
by thirty Senators, ten thereof represent-  
ing Nova Scotia, ten thereof represent-  
ing New Brunswick, four thereof represent-  
ing Prince Edward Island and six thereof  
representing Newfoundland; the Western

Provinces by thirty-six Senators, seven thereof representing Manitoba, twelve thereof representing British Columbia, seven thereof representing Saskatchewan, and ten thereof representing Alberta; and the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each."

Art. 13 For the purposes of this Part, the term "Province" in section 23 of the British North America Act, 1867 includes the Yukon Territory and the Northwest Territories.

PART III - LANGUAGE RIGHTS

- Art. 14 English and French are the official languages of Canada having the status and protection set forth in this Part, but no provision in this Part shall derogate from any right, privilege, or obligation existing under any other provision of the Constitution.
- Art. 15 A person has the right to use English or French in the debates of the Parliament of Canada.
- Art. 16 The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes are equally authoritative.
- Art. 17 A person has the right to use English or French in giving evidence before, or in any pleading or process in the Supreme Court of Canada or any court established by the Parliament of Canada, and to require that any document or judgment issuing from any such court be in English or French.
- Art. 18 A member of the public has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada.
- Art. 19 A provincial Legislative Assembly may, by resolution, declare that provisions similar to those of any part of Articles 15, 16, 17 and 18 shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts apply to the Legislative Assembly, courts and offices specified according to

the terms of such resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure described in Article 1 of this Proclamation.

Art. 20     A member of the public has the right to the use of the official language of his choice in communications between him and every principal office of a department or agency of the Government of Canada that is located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 21     The Parliament of Canada, in the exercise of powers assigned to it by the Constitution of Canada, and the Government of Canada, in the exercise of powers conferred on it by the Constitution of Canada or by any law enacted by Parliament, shall be guided, among other considerations for the welfare and advantage of the people of Canada, by the knowledge that a fundamental purpose underlying the Canadian federation is to ensure that the diverse cultures of its people may continue to be respected within that federation and by its institutions, and by the appreciation, as a consequence, of the importance of the two official languages of Canada as the languages of cultural expression used by those for whom the official languages of Canada are mother tongues; accordingly neither the Parliament of Canada nor the Government of Canada, in exercising the respective powers so assigned to or conferred on them, shall act in a manner that will adversely affect the preservation of either of the two official languages of Canada.

PART IV - REGIONAL DISPARITIES

- Art. 22      Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers, the Parliament of Canada and the Legislatures of the Provinces, together with the Government of Canada and the Governments of the Provinces, are committed to:
- (a) the promotion of equality of opportunity and well-being for all individuals in Canada;
  - (b) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
  - (c) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.



PART V - FEDERAL-PROVINCIAL CONSULTATION

- Art. 23      A conference composed of the Prime Minister of Canada and the First Ministers of the Provinces shall be called by the Prime Minister of Canada at least once a year unless, in any year, a majority of those composing the conference decide that it shall not be held.
- Art. 24      Before the Parliament of Canada may establish any new province in territories forming part of Canada, the question of the establishment of such province shall be placed on the agenda of a conference composed of the Prime Minister of Canada and the First Ministers of the Provinces for discussion by them.
- Art. 25      Before the Parliament of Canada may exercise its authority under section 92(10)(c) of the British North America Act, 1867 to declare any work or undertaking within a province to be for the general advantage of Canada or for the advantage of two or more provinces, the Government of Canada shall consult with the Government of the Province or Provinces in which the work or undertaking is located.

Art. 26      The Government of Canada, in order to ensure the fullest and most complete consultation practicable with the Government of any Province of Canada with respect to federal activities affecting, or likely to affect, the survival and development of the language used by any group of persons residing in that Province, or with respect to federal activities in support of or related to cultural activity, broadcasting or broadcasting services, or immigration, shall, if the Government of that Province so requests, establish with that Government a joint commission to heighten co-operation between them in relation to those federal activities, subject to a protocol of agreement defining the functions, attributes, composition and duration of that commission.

PART VI - MISCELLANEOUS

Art. 27      The Governor General of Canada may by Proclamation under the Great Seal of Canada proclaim a French-language text of the Constitution of Canada, or any part thereof, when so authorized by \_\_\_\_\_

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and thereafter that text shall be as authoritative as, and shall have the same force and effect as, the English-language text to which it corresponds, but shall not be held to operate as new law.

Art. 28      All laws in effect in Canada immediately before the coming into force of this Part, including those enactments set out in Article 29, shall continue as law in Canada except to the extent altered by this Proclamation, subject to be repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces, according to the authority of each under the Constitution of Canada.

Art. 29      Without limiting the meaning of that expression, the "Constitution of Canada" includes the following enactments and any orders thereunder, together with this Proclamation and any amendments thereto made by proclamation issued thereunder:

The British North America Acts,  
1867 to 1975;

The Manitoba Act, 1870;

The Parliament of Canada Act,  
1875;

Canada (Ontario Boundary) Act, 1869  
52-53 Vict., c. 28 (U.K.);

The Canadian Speaker (Appointment of  
Deputy) Act, 1895, Session 2, 59 Vict.,  
c. 3 (U.K.);

Alberta Act, 1905, 4-5 Edw. VII, c. 3;

Saskatchewan Act, 1905, 4-5 Edw. VII,  
c. 42;

Statute of Westminster, 1931, 22 Geo. V,  
c. 4 insofar as it applies to Canada.

Art. 30      This Proclamation shall come into force on the  
day it is promulgated by the Governor General.

DRAFT RESOLUTION RESPECTING THE CONSTITUTION OF CANADA

(Cont'd.)

And be it further resolved

That a humble Address be presented to Her Majesty the Queen in the following words:

To the Queen's Most Excellent Majesty:

Most Gracious Sovereign:

We Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada in Parliament assembled, humbly approach Your Majesty praying that You may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom to be expressed as follows:

"WHEREAS it is in accord with the status of Canada as an independent state that the Canadian people should be able through their chosen representatives to provide for themselves the means by which to alter their own Constitution in all respects.

And whereas hitherto certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

And whereas a proclamation entitled the "Proclamation respecting the Constitution of Canada" that was approved by the Senate and House of Commons of Canada on the \_\_\_ day of \_\_\_\_\_, 19\_\_ to be proclaimed by the Governor General of Canada embodies provisions with respect to the Constitution of Canada and the means whereby it may be amended;

And whereas Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom to make appropriate provision in connection with the matters aforesaid and the Senate and House of Commons have submitted an Address to Her Majesty praying that a measure be laid before the Parliament of the United Kingdom for that purpose:

Be it therefore enacted by the Queen's Most Excellent Majesty .... etc.:

1. When promulgated by the Governor General of Canada, the Proclamation shall, as well in the United Kingdom as in Canada, be recognized as having by virtue of the Proclamation the force of law.
2. No Act of Parliament of the United Kingdom passed after the promulgation of the Proclamation shall extend, or be deemed to extend, to Canada or to any province or territory of Canada as part of its law.
3. As from the promulgation of the Proclamation the enactments mentioned in the Schedule to this Act are, to the extent specified in column 3 of the Schedule, hereby repealed as enactments of the Parliament of the United Kingdom, but without prejudice to any operation which any of those enactments or any law, order, rule, regulation or other instrument made thereunder may continue to have by virtue of the Proclamation.
4. This Act may be cited as the Canada Act, 1977.



SCHEDULE

Enactments Ceasing to have Effect as Acts of the U.K. Parliament

<u>Chapter</u>	<u>Short Title</u>	<u>Extent of Repeal</u>
22 & 23 Geo. V. c. 4	The Statute of Westminster, 1931	Sections 2 to 5, in their application to Canada.  Section 7.  In section 10(3) the words "and Newfoundland".

Such other statutes as the British wish to repeal for their purposes. For example: the British North America Acts, 1867-1964.

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PRIME MINISTER

OTTAWA, K1A 0A2,  
September 2, 1977.

My dear Premier:

I followed with much interest the reports of the discussion at the meeting of the Premiers at St. Andrews concerning the language of education. I realize that the result was not precisely the one for which you hoped and that you did not formally subscribe to the "Statement on Language" that was issued. The "Statement" is, however, a very positive step for anyone who is interested, as I know you are, in ensuring that education is available in French not only to the francophone minorities in provinces other than Quebec but also to francophone Québécois who go to other provinces. You are reported in the press as having criticized the "Statement" because there is nothing in it to provide any certainty of implementation or any guarantee of permanence. These deficiencies could be met by appropriate constitutional provision and it is to suggest that this be done that I am writing to you and the other Premiers today.

. . . 2

The Honourable René Lévesque,  
Premier of Quebec,  
Parliament Buildings,  
QUEBEC, Quebec,  
G1A 1A2.

I am, of course, aware that the publicly stated objective of the party you head is to achieve the separation of Quebec from Canada and that, in that context, revision of our Constitution to make for a better Canada could appear to be inconsistent with that policy. You have made it clear, however, that, in your view, separation is dependent on approval of it in a referendum. . That referendum has not been held. It may or may not support separation. Whatever happens, the problems of languages of education are certain to remain with us unless some just and reasonable solution to those problems can be found. Since a possible line of solution through bilateral agreements has not been considered acceptable by the other provinces, a constitutional guarantee, established as soon as possible, is an alternative course that would be valuable and important for the whole of the francophone community in Canada. Whatever guarantee was acceptable would, of course, apply to the anglophone community in Quebec and I am well aware of the difficulties this involves for your government. Nevertheless, I am confident that those difficulties can be met by an appropriately framed guarantee.

What is proposed is to inscribe in the Constitution a right in relation to language of education based on the declaration of principle and your own stated objectives that emerged from St. Andrews. On the one hand, you could regard such a right as an isolated provision binding on Quebec only so long as Quebec remains within the Canadian federation; on the other, we could regard it as a part of a total Bill of Rights that would be worked out later.

As you know from the statement on language policy that was issued in June, the preference of the federal Government would be to have the constitutional right established in terms of the official language of choice. This could be done by inscribing in the Constitution a provision recognizing and declaring that, in Canada, every Canadian parent has the right to have his or her children receive their schooling in the official language of the parent's choice, wherever the numbers of children for whom one or the other official language is chosen warrant the provision of the necessary facilities. It is our hope that such a provision would be acceptable to the provinces which have adhered to the St. Andrews' "Statement", but we realize that it might cause difficulties for your government at the present time.

If the Government of Quebec feels that to be the case, one possibility would be to have the above-mentioned provision written into the Constitution in a form that would be binding on the other nine provinces. In the case of Quebec, if your government feels that the guarantee must be on the basis established in your recent legislation, the constitutional guarantee would be based on the language -- either French or English -- in which the parent has received his or her education.

In making this proposal, however, I am well aware that one of the most difficult problems that your government felt it had to deal with in its recent legislation on language of education was the question of the education of children in Quebec whose parents received their education in a language other than French or English. As already mentioned, the strong preference of the Government of Canada is to permit full freedom of choice, and we disagree fundamentally with your legislation in the way in which it deals with the problem. Nevertheless, in the interest of achieving an objective that is of such great importance to all Canadians, we are prepared to accept, with reluctance, the possible need for some arrangement for dealing with this problem that differs from our preferred policy

and we would of course be willing to discuss with your government how such an arrangement might best be achieved. In the course of those discussions, we would also wish to propose that, however the guarantee is framed, it would provide that children moving into Quebec from any other province would be able to pursue their education in the official language that they are in fact accustomed to use, just as French-speaking children moving from Quebec to any other province would be able to pursue their education in French.

While a special kind of guarantee for Quebec would almost certainly be demanded by your government for the shorter term, I would hope that, over time, the Government of Quebec will come to perceive a new sense of collective security about the development of the French language and culture and that it will then become possible for the Government of Quebec to accept the general guarantee which we are proposing to the other provinces. I would propose, therefore, that the provision for Quebec should be such that there could be "opting in" to the general guarantee when the province feels that this is possible.

Inscription of this basic right of the citizen in the Constitution in the manner of a Bill of Rights provision would make the right enforceable by the citizen in the courts. Such a provision would give no powers whatever to the Parliament or Government of Canada. It would, rather, constitute a guarantee that the right of the citizen could not be limited or taken away by any legislature or any government; on the contrary, this right would have to be established where it does not now exist. In short, it would be a protection of the citizen against government at all levels and a guarantee of the right to education of his or her children in the official language of choice - forthwith in nine provinces, and, I hope, at some future date in Quebec. In the interim, education of the children in the official language in which the parent was educated would be guaranteed in Quebec.



If constitutional guarantees were established in the above way, it seems to me that the result would be to achieve and to give force to very much the result for which you argued at St. Andrews. French-speaking children from Quebec going to the other provinces would be able to pursue their education in French wherever facilities could reasonably be made available. English-speaking children from the other provinces going to Quebec would similarly be able to pursue their education in their own language. The capacity of Quebec to limit access for other categories of people to English language schools could be preserved within the framework of the present Constitution so long as the Government of Quebec considers it necessary.

The new provisions that I propose would have constitutional certainty and not only the verbal expression of good intentions about which you were concerned. At the same time, there would be no intervention whatever by the federal Parliament or Government, into the field of education: the federal Government recognizes that education is a matter of provincial jurisdiction.

If you and the other Premiers are in favour of a constitutional provision along the lines I have suggested, I would like to propose that discussions be undertaken at an early point to determine the best form of the constitutional guarantee and how action might be taken on it.

I hope you will give serious thought to this proposal. You and I, and the parties we lead, differ on the solutions to which we subscribe for some of our problems. I venture to hope that we do not differ as to the desirability of achieving in whatever way may be effective and practical the extension of justice and fair treatment, both now and in the future, to the people resident in all the provinces of Canada. What I am proposing would give an enduring result to a statement of principle and intention that can profoundly affect the lives of thousands of children, born and unborn, throughout this country.




I am enclosing a copy of the letter on this subject that I am sending to the other first Ministers, and at the same time I am sending them a copy of this letter to you.

Sincerely,

Original signé par le Premier ministre  
Original signed by the Prime Minister

ORIGINAL: FRENCH



Government of Quebec  
Premier's Office

Quebec City  
September 9, 1977

Mr. Pierre-Elliott Trudeau  
Prime Minister of Canada  
Government of Canada  
Ottawa, Ontario

Dear Sir:

This is in response to your letter of September 2, in regard to the language of instruction. I found it very interesting and discussed it with my colleagues in the Government.

We were pleased to note that you acknowledged our commitment to place the future of Quebec in the hands of its people by means of a referendum and, consequently, the right of Quebecers to determine their own future and establish new relations with the rest of Canada.

We were also pleased to note that your government is ready to recognize that, in the present circumstances, the basic requirement mentioned in the chapter on instruction in the Charter of the French Language, namely, the language of instruction of the parents, should be the criterion of admission to English schools in Quebec. In our view, this is an acknowledgement of the constitutionality of this legislation.

In your letter, you also acknowledged that the present situation in Quebec is different enough from that of the other provinces to justify a different treatment in law.

In our province, the English school system is so well-developed that it could prove to be a threat to the very survival of the Francophone community through assimilation, whereas the French school system in the other provinces is still so incomplete that even the legal acknowledgement of the right to French-language instruction may for a long time remain a dead letter unless concrete moves are made in that direction.

It is for this reason that we believe that our proposal concerning reciprocity agreements between provinces is better than that of a constitutional amendment, which might in fact turn out to be one-sided. For example, this constitutional provision might easily prevent Quebec from regulating access to English schools, since these schools already exist and legislation governing access to them could be held unconstitutional. It is, moreover, difficult to imagine how such a provision could effectively guarantee Francophones in other provinces the French schools which they do not have since, under our legal system, a court of law has no power to force a parliament to legislate.

The insertion in a constitutional document of a provision on the language of instruction which could be applied only where "installing the required facilities is warranted" by the number of pupils would only create illusions, rather than conferring rights. You were right in dismissing the possibility of federal intervention in education. Since educational organization comes under provincial jurisdiction,

the constitutional guarantee itself could not be accompanied by the sanctions guaranteeing the exercise of this right, again because of the lack of power of the courts of law to force a government to act.

Moreover, you did not indicate whether the proposed constitutional amendment would be made simply by an amendment to the BNA Act by the British Parliament or whether it would be made when the constitution is "repatriated." In either case, it would be a long, complicated and even uncertain process.

When reading your letter, I therefore got the impression that your objectives are similar to those which I submitted to the conference of all the premiers in St Andrews, but that you are trying to reach them by a route which is strewn with so many problems and possible delays that the attempt is compromised from the very beginning, and in any case, can only lead to a guarantee which would be more theoretical than practical. I assume you are already aware of this.

The offer I made my colleagues in the other provinces concerning reciprocity agreements has an advantage in that it can be adapted to the particular circumstances of each province and put into effect quickly, without anyone having to surrender any power.

On the other hand, a constitutional amendment would restrict the power of the provincial legislatures over education by limiting their powers to legislate on the question. My government, like the previous governments of Quebec, has always felt that the powers which we hold over matters of education are

absolutely vital to the safeguarding of our cultural identity, and that we must retain our full room for manoeuvre in this matter, in order to be able to adapt to the changing situation, whatever direction it might take.

This basic principle is in my view irreconcilable with your proposal to subject Quebec to a constitutional provision which, even if its basis is different from that of the other provinces, would still take away some of Quebec's exclusive power over matters of education. Quebec will never agree to let its complete sovereignty over such a vital matter be replaced by a restricted jurisdiction which is subject to judicial interpretation. In fact, it would be unthinkable that the Supreme Court of Canada, a majority of the members of which will always be Anglophones and non-Quebecers, should replace the Quebec National Assembly as the ultimate authority in matters of education in Quebec.

I would like to point out that this attitude has nothing to do with our government's goal of political sovereignty. On the contrary, these powers over education are especially necessary within the present federal framework, since we must protect ourselves against our gradually becoming a minority within the province of Quebec itself.

Your letter reflects an attempt to understand the situation in Quebec, and I appreciate this as well as your desire, which we share, to improve the lot of Francophones outside Quebec and respect the rights of the Anglophone minority within Quebec.

I would, however, like to point out that in the past ten years, three different Quebec laws have been passed on this question of language. The last was just recently assented to by the National Assembly and all its effects are still not known. I have publicly stated that we, as a society, must give this new Act a fair trial for a few years, even if this means amending it to correct any weaknesses which might be found. It is therefore impossible for us to submit to a constitutional yoke which would prevent us from legislating, for the future, in the direction required by our society's evolution.

Yours truly,

(sgd) René Levesque







## OFFICE OF THE PRIME MINISTER • CABINET DU PREMIER MINISTRE

PRIME MINISTER'S LETTERS TO PREMIERS MOORES, CAMPBELL,  
REGAN, HATFIELD, DAVIS, SCHREYER, BLAKENEY, LOUGHEED  
and BENNETT of OCTOBER 6, 1977

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LETTRES du PREMIER MINISTRE A MM MOORES, CAMPBELL,  
REGAN, HATFIELD, DAVIS, SCHREYER, BLAKENEY, LOUGHEED  
et BENNETT du 6 OCTOBRE 1977





PRIME MINISTER · PREMIER MINISTRE

Ottawa K1A 0A2  
October 6, 1977

My dear Premier:

As you are no doubt aware, Premier Lévesque replied on September 9 to my letter of September 2 concerning the entrenchment of minority official language education rights in our Constitution. A copy of his letter is attached for your information.

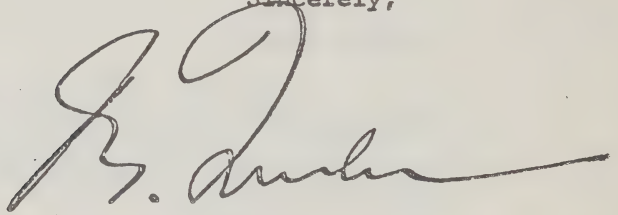
Although he expressed appreciation for my understanding of the special circumstances which presently prevail in Quebec, he rejected the proposal because he felt that it would constitute the abandonment of part of Quebec's exclusive competence in the field of education and because he doubted the ultimate efficacy of judicial review. I am not able to agree with either of his reservations and I am sending a second letter to Premier Lévesque today to ask him to reconsider his initial response. A copy of this letter and the English translation are attached.

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(The same letter sent to Premiers Moores, Campbell Regan, Hatfield, Davis, Schreyer, Blakeney, Lougheed and Bennett)

I suggest once again that discussions begin at an early point to determine the best form for entrenching minority official language education rights in our Constitution. I do hope that, with your active collaboration, we will achieve positive results in this area.

Sincerely,

A handwritten signature in dark ink, appearing to read "B. Amodeo". The signature is fluid and cursive, with a large, stylized initial "B" and a long, sweeping horizontal stroke at the end.

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PRIME MINISTER'S LETTER TO THE  
PREMIER OF QUEBEC

AND

POSITION OF THE FEDERAL GOVERNMENT  
ON QUEBEC'S BILL 101

OCTOBER 6, 1977

LETTRE DU PREMIER MINISTRE AU  
PREMIER MINISTRE DU QUEBEC

ET

POSITION DU GOUVERNEMENT FEDERAL  
A L'EGARD DE LA LOI 101 (QUEBEC)

LE 6 OCTOBRE, 1977

Ottawa K1A 0A2





PRIME MINISTER'S REPLY TO THE LETTER ADDRESSED TO HIM ON  
SEPTEMBER 9, 1977, BY THE PREMIER OF QUEBEC

(TRANSLATION)

My dear Premier:

May I begin by expressing my thanks for your prompt reply of September 9 to the proposal which I made to you and to the other nine Premiers of Canada's provinces for a possible new approach to the important and difficult problem of safeguarding the rights of Canadian children -- both francophone and anglophone -- with regard to the official language in which they should be entitled to receive their education.

While I naturally regret that you have seen fit to reject the proposal, it seems to me that further discussion of this most important issue between us cannot help but be conducive to a greater understanding of our respective points of view. I am heartened that a process of reasoned discussion has begun on this issue. This is an essential pre-condition to the reaching of any agreement between people of goodwill, concerned with finding a just and reasonable solution to a problem which, as I stated in my letter to you, could remain with us for a long time to come unless such a solution is found.

For this reason, I feel it my duty to write to you again to urge you to reconsider your position, in order that the unsatisfactory conditions that the proposed guarantee would seek to remedy may be dealt with as expeditiously as possible.

I do not, in this letter, wish to debate certain conclusions drawn in your letter about implications you suggest are involved in my letter to you -- such as those about the referendum you plan to hold, about the criteria you have seen fit to prescribe for admission to English schools, about the constitutionality of your language law, or about the "real situation" in Quebec. I wish simply to make clear that the conclusions are yours, not mine.

But the concern expressed in your letter for the children of francophones outside Quebec, as well as for francophone Quebecers who may move to other parts of Canada, has encouraged me to write to you again. Clearly we have a shared concern in this regard. You recognize the need to resolve the secular problem raised by the definition and safeguarding of

language rights in education. You expressed the opinion that the route I have proposed is so strewn with difficulties that it is doomed from the outset. I do not deny there may be difficulties in arriving at any solution that can hope to gain the degree of acceptance among all our people which is essential to an enduring solution. But you must be equally aware, since the St. Andrews Conference, that the difficulties inherent in the method that you have advanced appear to be insurmountable. You note that this method -- the conclusion of reciprocal agreements between provincial governments -- would not have involved "any abdication of power whatsoever on the part of anyone". But for that very reason, it would have had neither certainty nor permanence. It is therefore necessary, in my view, that we, and our colleagues from the other provinces, continue to strive for the most practical, effective and durable solution to this longstanding problem.

Your letter expresses appreciation for my understanding of the special circumstances which presently prevail in Quebec. Recognition of the possibility of a difference of situation for a period of time in respect of constitutional guarantees is by no means a new one. It was a feature of the Victoria Charter in 1971, where there was provision for "opting in" at later dates by provinces that did not then feel that they could accept the full language guarantees that other provinces were ready to endorse. "Opting in" was also provided for in my letter to Premier Lougheed, which went to all the Premiers in January 1977. Now, as then, the resolution of our problems must be based on a recognition of realities.

The position and policy of the federal Government are for full freedom for all Canadians to be educated in the official language of their choice, wherever numbers justify it. Regrettably, in our view, your government has a different perception of future prospects for the French language in Quebec and of the conditions needed to assure its continued development than that held by the federal Government. You do not accept freedom of choice. This fact is reflected in Bill 101 and I realize that it will likely remain law until it is either struck down by the courts or changed by the electoral process. In these circumstances, what I am proposing represents the most effective guarantee that can realistically be obtained from your government at the present time: a modification of Bill 101, in the spirit of your proposal at St. Andrews, to provide freedom of choice in education to citizens moving into Quebec from other provinces, plus a provision for opting into full freedom of choice for everyone in Quebec, hopefully in the near future. In the case of the other provinces, all of whose Premiers endorsed the statement at the end of the St. Andrews Conference,

I would hope that the guarantee of full freedom of choice could be accepted now. If, however, some provinces require more time before accepting the constitutional obligation, clearly "opting in" in whole or in part, now or later, should be available to them too.

It is in this spirit that I should like to return to my proposal of September 2 and to invite you to reconsider it in the light of what follows. I must address what I take to be the two central arguments you have advanced to justify the rejection of my proposal.

#### The Constitution and Fundamental Rights

The first argument is that a language guarantee, if made part of the Constitution of Canada on the basis I have suggested, would "constitute the abandonment of part of Quebec's exclusive competence in the field of education".

As a preliminary observation, I point out again that my proposed guarantee would not authorize the Parliament or Government of Canada to encroach in any way on the provinces' exclusive jurisdiction over education, which would remain in all respects a matter for the provinces, as it is now under our Constitution. Quite simply, one of the most important intended effects of the proposal set out in my letter would be a much more advantageous regime, not only in the short term but in the more distant and less foreseeable future, for ensuring the survival of the French language and culture both in Quebec and throughout the rest of Canada.

This observation made, it seems to me to be wholly proper to ask whether, or to what extent, it might be true that the proposed constitutional guarantee would, if accepted by Quebec, "constitute an abandonment of part of Quebec's exclusive competence in the field of education". In my view, the real answer to this question must depend on how one sees a Constitution as an instrument by which a society defines its goals, fashions its institutions and allocates powers. In this regard, it may be that there is, indeed, a fundamental divergence of views between us on whether certain fundamental rights and freedoms should, in a democratic society, be reserved to individuals and minorities and be untouchable by the state. I sincerely hope that this divergence of views is more apparent than real.

It is my personal and deep conviction that the citizen in a democracy should enjoy certain fundamental rights and freedoms which take precedence over the laws promulgated by any legislature and the regulations decreed by any government, because they are so fundamental to the very existence of such a democratic society that they should be beyond the reach of its governmental institutions. I am convinced that one of the primary and obligatory aims of any constitution must be to define these rights and assure their inalienability. I have long deplored the serious omissions in our present Canadian Constitution in this regard, and I have striven, for more than ten years of my life in public office, to persuade Canadians and the governments which they elect, including, of course, the provincial governments with which the federal Government shares political authority, that the entrenchment in the Constitution of our country of a charter of fundamental rights should be among the highest of our priorities. I remind you in this regard of the letter I sent last January to the Premier of Alberta, of which you received a copy and in which I referred to the basic provisions of the Charter of Victoria.

I come back to your first basic objection, namely that, in accepting my proposal for a constitutional guarantee of language rights, your government would in reality be abandoning a part of Quebec's exclusive jurisdiction in the matter of education. I really cannot see what is the legal basis for this statement. As I see it, the authority of the Quebec legislature in the matter of education would remain exclusive after the proclamation of the constitutional guarantee because the latter would not in any way authorize any other legislature in Canada to legislate for Quebec on this subject. Indeed, the new constitutional provisions would subject the exercise of legislative power to the protection of the recognized rights of the citizen, but is this not the necessary consequence, the main object, of any constitutional recognition of fundamental rights?

You state that your government must keep intact its margin for manoeuvre in the matter of education "so as to adapt itself to the evolving situation, whatever it may be". You declare that Quebec cannot imprison itself in a "constitutional straitjacket which would prevent us from legislating, for the future, in the direction required by our society." You affirm that Quebec will never accept having its sovereignty in such a vital matter replaced by a limited authority, subject to judicial interpretation.



But surely you do not believe that the rights of the citizen are an affair of convenience, or opportunity, or of the circumstances of the day? That the powers of the legislature and of the executive over the citizen must at all times remain wholly absolute? That fundamental rights are neither more nor less than whatever the Government of the day says they are or should be, and should not be safeguarded in a Constitution.

Surely you are not saying that Quebecers -- as much those who form the francophone majority as those who belong to the anglophone minority -- must remain indefinitely in a state of uncertainty as to the rights they now enjoy and can expect to enjoy in the future? I willingly admit -- and my proposal provides for it -- that the legislature of Quebec should reserve the power to extend, when appropriate, those rights the restriction of which at the moment appears to your government to be necessary, and to enlarge somewhat that which Fernand Dumont once called "l'aire de la liberté" au Québec. But do you really consider it necessary to retain the power to restrict those rights even more than they are restricted at the moment? I cannot believe that that is your intention. If it is not, I urge you to consider that the guarantee I have suggested, since it provides a degree of security to the minority group in Quebec or anglophones moving to Quebec, while taking away from the legislature of that province no power that it could conceivably need.

To justify your rejection of my proposal, you allege that the legislature of Quebec must remain empowered to correct the deficiencies of your government's language legislation. But the proposed guarantee would not prevent you from correcting these deficiencies. I must ask you again: do you seriously consider that the legislature should be able, as a matter of "sovereignty", to curtail further the linguistic rights of Quebecers? In order to adapt itself to the evolving situation, "whatever it may be", must it retain the latitude to suppress completely these rights?

The reasons which you cite to reject any constitutional guarantee on linguistic rights in education appear to me very hard to reconcile with your expressed wish, clearly stated again in your letter of September 9 and which I refuse to question, to ensure that the rights of the anglophone minority in Quebec be respected. It also seems to me that those reasons run contrary to your willingness, no less clearly expressed at St. Andrews, to relax certain provisions of the Charter of the French Language for the benefit of Canadians from other provinces who may choose to move to Quebec in the future.

Finally, the reasons which you cite seem to me to contradict a fundamental aspect of the ideology and the program of the political party which you lead. I noted with interest, in reading the program of the Parti Québécois, that it had committed itself, once in power, to present a draft Constitution which would include a declaration of human rights inspired by the Universal Declaration of the United Nations, establishing such fundamental rights as the right of the individual to personal freedom and security, equality before the law, freedom of thought, opinion, conscience and religion, and other basic rights, including specifically the right to education and to culture.

To consecrate by constitutional means the right to education and the right to culture in a pluralist society like Quebec, a society where an anglophone minority co-exists with a francophone majority, would lead one necessarily, it seems to me, to affirm constitutionally the linguistic rights of that minority, because, as you have repeated so often, language cannot be dissociated from education and culture.

It is for these reasons that I thought you would find acceptable the proposal which I sent to you on September 2. It is in the light of these considerations, as well, that I feel that only the promptness with which you obviously wished to reply to my letter prevented you from examining all aspects of the proposal, and why I ask you to reconsider your decision on this matter.

#### The Courts and Fundamental Rights

The second major argument you advance in your letter is that a constitutional guarantee of freedom of choice in the case of the other nine provinces, qualified by reference to the number of children that would permit the necessary facilities, could remain a "dead letter" for a long time, and therefore would "only create illusions rather than confer rights". I assume that you say this because you argue that a court of justice does not have the power to compel a Parliament to legislate. I would suggest to you that the provision of a right in our Constitution would make a very profound difference and would place very real powers in the hand of a court. A provision requiring that teaching be made available in the language of the minority "wherever numbers warrant" would not leave it to the government of a province to determine in complete liberty what numbers do, in fact, warrant. It would be open to the courts to interpret the phrase and to decide whether a government was or was not meeting an acceptable standard in deciding on the provision of such education. In short, the unfettered discretion that we now have, unsupported by any declaration of right, would become a discretion subject to judicial review backed by a firm declaration of right.



I confess, therefore, that I have great difficulty in understanding your argument, which seems to me to proceed from an entirely unwarranted lack of trust in the deeply engrained and compelling traditions of Canadian democracy. These traditions, in my view, make it unthinkable that a direction of a court of justice to a particular school board, for example, or a judgment of such a court, whether at the local level or at the highest level in the land, declaring the rights of the members of a particular linguistic minority in the matter of the language of their children's education, would be or could be simply ignored. You are, of course, quite right that under our system of government no court of justice could force the legislature of a province, through or by means of its own process alone, to pass a law for the provision of certain educational services. But a government -- be it federal or provincial -- that chose simply to ignore the pronouncements of a duly constituted court of justice, after the appropriate and proper avenues of review or appeal had been followed, would surely find itself in very serious difficulties indeed, not only with its own constituents, but also in the judgment in which it would be held by people everywhere. Any orderly democratic society depends ultimately on the respect that its citizens and its governments have for its laws; without that respect there can be no such orderly society. Respect for the rule of law is just as fundamental to respect for any Constitution as its basic acceptability to those who are governed by it. For this reason, I cannot share your concern that the guarantee would remain a "dead letter" in the other provinces, if indeed the guarantee was democratically considered and approved by the other provinces in the way that is traditional in Canada.

On a somewhat related point, you have also indicated that it is unthinkable that the Supreme Court of Canada should take the place of the National Assembly of Quebec as the "ultimate authority" in the field of education. For the reasons I have already outlined, I have great difficulty in seeing how my proposal could possibly lead to such a result. It is, however, obvious that the fact that a majority of the members of the Supreme Court of Canada "will always be anglophones and non-Quebeckers" has an important place in your thinking about the role of the Supreme Court in judicial interpretation of the Constitution.

Can one conclude from your observation that, in your view, majority representation on the bench of whatever social category is involved in litigation is a necessary condition for the meting out of justice? How, then, would Quebec organize its judicial system under your projected separation from the rest of Canada? Would it ensure majority representation of anglophone and Native minorities on the Quebec courts from which they would seek redress? Would it establish special courts for these minorities? Otherwise, would it be "unthinkable", according to your logic that these minorities be subject to courts which, in the nature of things, would always be composed of a majority of francophones, as indeed the Appeal Court of Quebec is now?

Need I add that I cannot accept your line of reasoning in this regard? The judicial annals of Canada and of other democracies are replete with cases, often precedent-setting cases, where the outnumbered and the weaker elements of society have sought and obtained redress from courts where they were hardly represented, if at all, often despite and against social trends and "majority views" then prevailing. I hold that, in a democratic society, justice depends on the quality of constitutional and other legal instruments, on the independence, impartiality and wisdom of the judiciary, on rigorous adherence to due process. The ethnic, linguistic or regional origin of magistrates has generally been -- as it must be -- merely an accident of history in the application of the law.

Nevertheless, I believe that there may possibly be ways and means of meeting the underlying concern of your government regarding the present structure and make-up of the Supreme Court of Canada. I would, therefore, urge that we take advantage of the further discussions between us which I have already proposed to explore these possibilities.

#### Constitutional Change

The final point I should like to make concerns your further comment that my proposal does not indicate how the constitutional modification would be accomplished but that, in any case, "it would necessarily be a long, complex, even uncertain procedure". On this point, once again, I must disagree. Were we collectively, as governments, to reach agreement to proceed with a limited amendment to the Constitution along the lines proposed in my letter of September 2, I see no reason at all why the procedure would need to be long or complex or uncertain.

As to how I would see the modification accomplished, I am open to whatever suggestions you and the other Premiers may wish to put forward. Certainly, I would not be averse to proceeding by way of "a simple amendment to the B.N.A. Act by the British Parliament", which is one of the possibilities you yourself mention. However, you are well aware of my desire to bring about the patriation of the Constitution of Canada, which is another possibility your letter mentions. You may rest assured that, should this method of somewhat greater complexity have your preference, I would be most willing to proceed with it.

Once again, I invite you to reconsider your position on the advisability of providing for education language rights in the Constitution of Canada. Indeed, I implore you to do so, if only for the sake of the francophone minorities in other provinces, who at last would have the support of the Constitution in their

long struggle to affirm their rights. I emphasize also that this guarantee would ensure to the anglophone minority of Quebec that its language rights would no longer be subject to further restrictions. On that basis, we could then concentrate our efforts on extending and fulfilling the rights of our linguistic minorities. I, therefore, reiterate my suggestion that discussions begin at an early point to determine the best form of any such guarantee.

To complete their records, I am sending to the other first Ministers a copy of your letter to me of September 9, as well as a copy of this one.

Sincerely,

POSITION OF THE FEDERAL GOVERNMENT  
WITH REGARD TO QUEBEC'S BILL 101  
"CHARTER OF THE FRENCH LANGUAGE"

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October 5, 1977

1. Bill 101 is of concern to the federal Government because it will adversely affect:
  - (a) the unity of Canada and the development of equal rights for the two official languages;
  - (b) the fundamental rights and freedoms of Canadians;
  - (c) the security and development of official language minority communities throughout the country; and
  - (d) the prosperity of Quebec.
2. The federal Government considers that Bill 101 is inconsistent with the federal Government's concept of a Canada in which the rights of all official language minorities in the country, whether anglophones in Quebec or francophones in other provinces, would be fully respected. In particular, the federal Government believes that both levels of government should provide basic services in both official languages where numbers warrant, and should actively promote linguistic equality.
3. The federal Government is committed to the maintenance in Quebec of a society which is primarily French-speaking in character. It believes the federal and Quebec Governments should act vigorously to promote the French-speaking character of the province so that its French-speaking society flourishes in all its aspects. However, it believes this can be done by positive steps without coercion and without restrictions on the rights of the English minority in the province.
4. The federal Government considers Bill 101 to be a source of division both in Quebec and throughout the country. The federal Government does not share the PQ perception of the precarious state of the French language in Quebec. The federal Government strongly deplores that because of this perception the Quebec Government has enacted legislation which isolates Quebec from the rest of Canada. While the ultimate objective of the Parti Québécois is well known, the federal Government believes the PQ government is violating the wishes of the Quebec population and the limited mandate it received, when it proceeds to implement a separatist measure such as forbidding Canadians who migrate to Quebec the right to choose the language of education for their children. This step is inconsistent with the federal Government's view that no government in Canada should in any way inhibit free movement within the country.
5. The federal Government fears that PQ doctrines and the restrictions imposed on the mobility of families will encourage investors to locate their enterprises outside of Quebec and, as a consequence, increase unemployment and aggravate the existing problems facing the province.

The federal Government believes that collaboration rather than confrontation would secure the linguistic aspirations of Quebecers without eroding the economic health of the province.

6. More specifically, the federal Government totally opposes those provisions of Bill 101 which:
  - (a) deny the equal official status of French and English in that part of Canada formed by Quebec;
  - (b) deny the equal status of French and English in legislation and in the courts;
  - (c) deprive all Quebecers, except certain anglophones, of the right to choose freely the language of education of their children;
  - (d) forbid English-speaking Canadians coming to settle in Quebec entry to English schools;
  - (e) deny any guarantee that, in the future, public and para-public services will be offered in English as well as French; and
  - (f) adversely affect the vitality of business and industry in Quebec and the development of a sound economy in that province.
  
7. Based on a close examination of Bill 101, the federal Government has concluded that:
  - (a) a few provisions of the law are of doubtful constitutional validity, while certain other provisions might be found to be unconstitutional depending upon their application in practice;
  - (b) the constitutionality of a provincial law should normally be tested initially before the provincial courts so that when a case comes before the Supreme Court for final determination, that Court will have the benefit of the considered judgments of the provincial courts on the interpretation of a provincial law; and
  - (c) the procedure for a reference under the Supreme Court Act should normally be confined to cases where the Court has before it a substantial factual framework within which to adjudicate the issues. Otherwise the Court is placed in the difficult position of having to render an opinion in the abstract, without the benefit of concrete facts to which it may apply the law. The issues raised by the Charter are extremely numerous and complex, and consequently a well-reasoned final judgment can only properly emerge in the course of ordinary litigation before the lower courts.



8. Therefore, the federal Government:
- (a) has concluded that it would not be appropriate in the present circumstances to refer the Quebec legislation directly to the Supreme Court for a determination of its constitutional validity; and
  - (b) will intervene and state its case in any appropriate action commenced by an individual or a group in Quebec contesting one or more provisions of Bill 101 on constitutional grounds, or take such other legal action as the circumstances of a particular case may dictate, if and when such cases arise. In this regard, the federal Government will be appearing in the recent case commenced in the Superior Court in Montreal to present arguments contesting the constitutional validity of those provisions of the Bill respecting the language of the legislature and the courts.
9. Bill 101 is now a provincial law. The federal Government believes that political rather than legal initiatives are more appropriate in the circumstances and that the repressive provisions of the Bill should be abolished through the democratic process. The federal Government wishes to ensure that the rights of individual Quebecers are not further eroded. It also wishes to ensure that the rights of official language minorities across Canada will be permanently protected in the Constitution of the country rather than subject to the will of individual governments.
10. Therefore, the federal Government has proposed to all the provinces that by an amendment to the Constitution they entrench the right of all Canadian parents to choose, where numbers warrant, the official language in which their children will be educated. It has suggested an "opting in" procedure which would permit individual provinces to accept such a constitutional amendment before others were ready or able to do so. This "opting in" procedure was first suggested in relation to entrenched language rights in the Victoria Charter of 1971. While the federal Government then considered such a procedure less desirable than the immediate entrenchment of those rights, it accepted the idea in recognition of the fact that only thus would progress be made. The federal Government again recognizes that such a procedure in the present context would be less desirable than immediate entrenchment by all provinces. The suggestion in no way endorses the relevant sections of Bill 101. The federal Government is prepared to discuss this proposal with any interested provincial government.



11. The federal Government will also seek the commitment of provinces to certain principles of equality of the two official languages. It will explore with them how to ensure through a variety of federal and provincial initiatives that the rights of official language minorities across Canada are respected and protected in practice. These program initiatives would give further substance to the constitutional amendment the government is seeking while demonstrating to Canadians that the language and culture of both official language communities can flourish throughout a united Canada.











